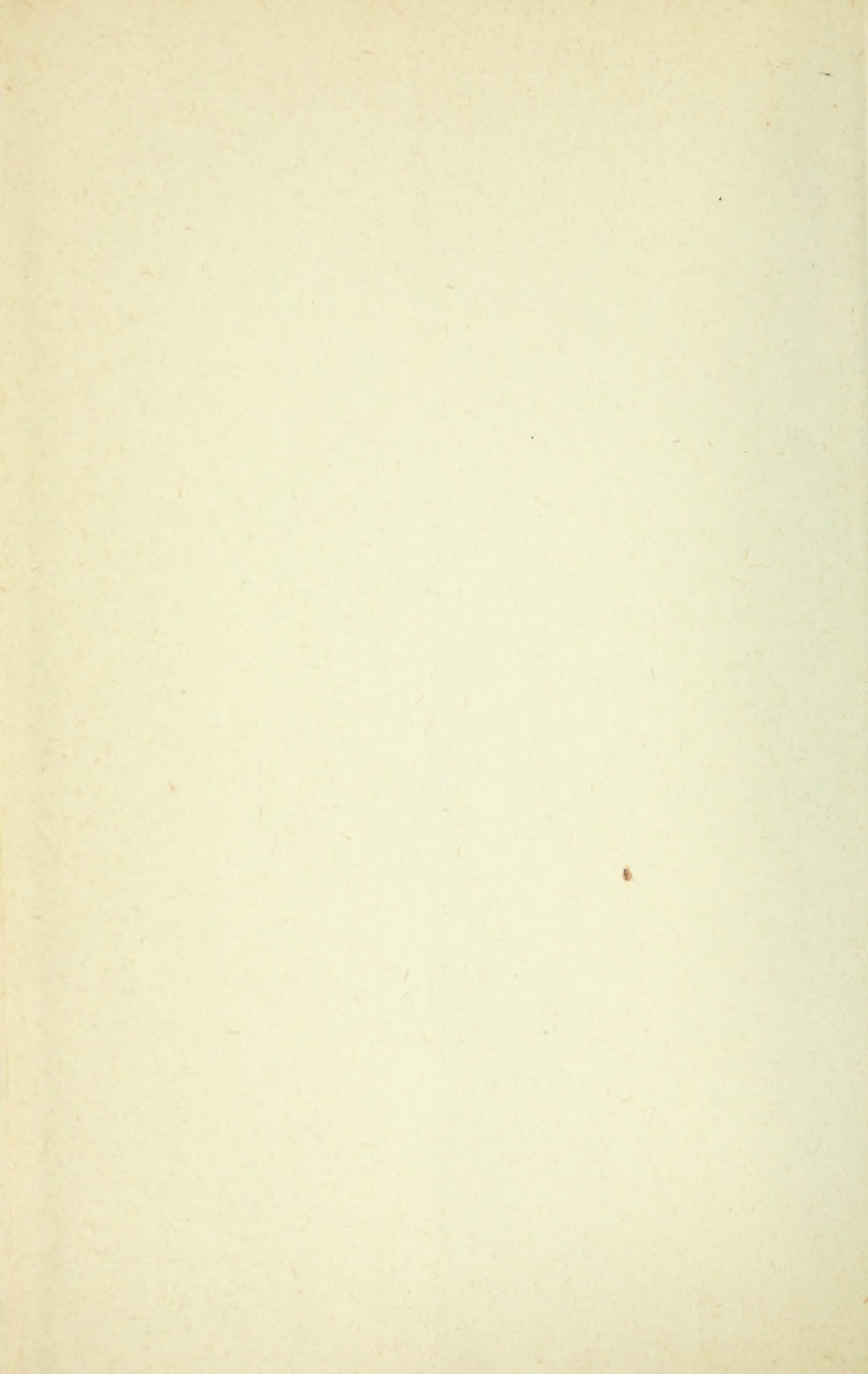




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EVIDENCE AND PRACTICE

AT

TRIALS

IN

CIVIL CASES

BY

R. E. KINGSFORD, M.A., LL.B.,
TORONTO

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PREFACE.

The present Edition contains several changes in the arrangement of the text. The general plan is unaltered. Many references to cases reported since the publication of the last Edition (1908) have been inserted. The favourable reception given to the book has been a great encouragement to proceed with the preparation of this Edition. I hope the book will continue to keep its place as a useful work of reference.

R. E. KINGSFORD.

ONTARIO STATUTES, 1911.

The Ontario Statutes for 1911 having been received too late for reference in the text, must be noted as follows:

ACCIDENTAL FIRES.

The Statute of Ontario 1907 referred to on page 504, is repealed by chapter 19 Ontario Statutes, 1911. The new statute is not retrospective, which is the only change in effect.

BED OF NAVIGABLE WATERS.

By section 2, chapter 6, it is declared that grants of land bordering on a navigable body of water, or stream, are presumed not to include the bed of the body of water or stream. Section 3 saves the rights of persons who have developed water powers, or whose rights have been adjudicated upon. The Act is to be brought into force by Order in Council, which was done 30th May, 1911.

EVIDENCE ACT.

Sec. 31. See footnote, page 609.

LANDS TO BE SUBJECT TO DEBTS.

Sub-section 6 of section 34 of chapter 17.

APPORTIONMENT OF PERIODICAL RENTS.

See chapter 21, Ontario Statutes, 1911.

VEXATIOUS ACTIONS, PROTECTION AGAINST.

See chapter 22, Ontario Statutes, 1911.

VOLUNTARY AND FRAUDULENT CONVEYANCES.

See chapter 24, Ontario Statutes, 1911.

TRUSTEES AND EXECUTORS AND ADMINISTRATION OF ESTATES.

See chapter 49 Ontario Statutes, 1911.

CONDITIONAL SALES OF GOODS.

See chapter 30 Ontario Statutes, 1911.

COMPENSATION FOR FATAL ACCIDENTS.

See chapter 33 Ontario Statutes, 1911.

LAW OF LANDLORD AND TENANT.

See chapter 37 Ontario Statutes, 1911.

INNKEEPERS.

See chapter 49 Ontario Statutes, 1911.

PAWNBROKERS.

See chapter 50 Ontario Statutes, 1911.

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For detail see page 3.

PROOF AND EFFECT OF DOCUMENTARY EVIDENCE.

For detail see page 50.

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For detail see page 108.

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ADDENDA.

(Alphabetically Arranged.)

Agister.—Whether cattle are at large or not depends on whether they are under restraint or control, irrespective of whether they are on their owner's land or not. *O'Connor v. Reid*, 13 W. L. R. 401. *Krenzenbeck v. Canadian Northern R. W. Co.*, 13 W. L. R. 414.

Auctioneer.—Commission was payable on the property being knocked down to a purchaser at the auction, notwithstanding that there was no completed sale. *Peacock v. Freeman* (4 T. L. R. 541), distinguished. *Skinner v. Andrews*, 54 S. J. 360, 26 T. L. R. 340—C.A.

Carrier.—Where a consignor who delivers goods to a common carrier, for carriage by him in performance of his common law obligation to carry, does not give notice to the carrier that the goods are dangerous; he must, unless the carrier knows, or ought to know, the dangerous character of the goods, be taken impliedly to warrant that the goods are fit for carriage in the ordinary way, and not dangerous. *Brass v. Maitland* (26 L. J. Q. B. 49; 6 E. & B. 470), and *Acatos v. Burns* (47 L. J. Ex. 566; 3 Ex. D. 282), discussed. *Bamfield v. Goole and Sheffield Transport Co.* (1910), 2 K. B. 94.

Consideration.—If a person makes a contract for a good consideration to do something which he was already bound to do, though no one was at the time sure that the duty already existed, the other party can sue upon the contract. *Williams v. O'Keefe*, 79 L. J. P. C. 53; (1910), A. C. 186; 101 L. T. 762.

Copyright—Infringement—List of Names—"Stud Book"—Unfair Use of Book in Preparing another Publication. *Weatherby v. International Horse Agency and Exchange, Limited*, 26 T. L. R. 527.

Damages.—The Judge's charge is not complained of. It seems to me to be fair and raise the proper points for the consideration of the jury, as indicated in *Phillips v. London and South Western R. W. Co.*, 5 C. P. D. 280, that is to say, that the jury should take into consideration: (a) the expenses occasioned to the plaintiff by the accident; (b) the loss he would suffer by being incapacitated for a certain length of time; (c) the loss which he would sustain by reason of his inability to earn full wages for such period as

the jury would think fit; and (d) an amount for the suffering and pain he underwent at the time, and also for the future, it might almost be said for the remainder of his life. *Farquharson v. British Columbia Electric R. W. Co.*, 14 W. L. R. at 96.

Defamation.—Slander—Imputation of having Committed Offence—Arrest—Offence Punishable by Fine. *Helwig v. Mitchell*, 79 L. J. K. B. 270; (1910), 1 K. B. 609; 102 L. T. 110; 26 T. L. R. 244.

Evidence.—Declaration by Deceased Person—Admissibility—Workmen's Compensation. *Gilbey v. Great Western Railway*, 102 L. T. 202.

Limitations, Statute of.—Where money has been paid under a mistake of fact, the Statute of Limitations begins to run from the time of such payment except in cases where, previous to the Judicature Act, 1873, equitable relief only could have been obtained. *Brookshank v. Smith* (6 L. J. Ex. Eq. 34; 2 Y. & C. 58) explained. *Baker v. Courage*, 79 L. J. K. B. 313; (1910), 1 K. B. 56; 101 L. T. 854.

Where both parties were under the mistake when the payment was made, the cause of action is complete on such payment, and no demand for repayment is necessary. *Freeman v. Jeffries* (38 L. J. Ex. 116; L. R. 4 Ex. 189), distinguished. *Ib.*

Payment.—Appropriation of Payments—Intention. *Deeley v. Lloyds Bank* (1910), 1 Ch. 648; 102 L. T. 556.

Principal and Agent.—In order that the principle of "holding out" should in any case of agency be applicable the act done by the agent, and relied upon to bind the principal, must be one which the agent is held out as having a general authority on his principal's behalf to do. *Russo-Chinese Bank v. Li Yau Sam*, 79 L. J. P. C. 60; (1910), A. C. 174; 101 L. T. 689; 26 T. L. R. 203.

Negligence.—Special contract between express company and shipper — How far to be applied for benefit of railway company. (Reference also to *Meux v. Great Eastern R. W. Co.* (1895), 2 Q. B. 387). *Allen v. Canadian Pacific R. W. Co.*, 1 O. W. N. 84, 897.

Failure to shew manner and cause of death. *Beck v. C. N. R. R. W. Co.*, 13 W. L. R. 140.

At common law the owner of animals must keep them from trespassing upon the lands of other persons, even though such lands are unfenced. *Dalziel v. Zastie*, 13 W. L. R. 488.

Unless an animal is shewn to be harmless by its very nature, or to belong to a class that has become so by what may be called "cultivation," it falls within the class of animals as to which the rule is, that a man who owns and keeps one must take the responsibility of keeping it safe. *Pillburn v. Peoples Palace Co.*, 25 Q. B. D. 258, followed. *Andrew v. Kilgour*, 13 W. L. R. 608.

Injury to person endeavouring to save life. *Seymour v. Winnipeg Electric R. W. Co.*, 13 W. L. R. 566.

Res ipsa loquitur. *Isbister v. Dominion Fish Co.*, 13 W. L. R. at page 590.

Child climbing fence. *Harrold v. Watney*, 67 L. J. Q. B. 771; (1898), 2 Q. B. 320; 78 L. T. 788; 46 W. R. 642.

There is a duty imposed on those who set up or instal a machine or send forth an article of a dangerous character towards those who may come near the dangerous object, whether or not there may be any contractual relationship; and the person so doing will be liable for accident unless it can be shewn that the proximate cause of the accident was the conscious act of another volition. *Dominion Natural Gas Co. v. Collins*, 79 L. J. P. C. 13; (1909), A. C. 640; 101 L. T. 359; 25 T. L. R. 831—P. C.

A leading case appears still to be *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311, in which the position of such an one as the plaintiff is defined to be that of a person invited upon the premises by the owner for the transaction of business in which both are interested. And the duty owing in such a case is there said to be to take reasonable means to guard the invitee from dangers which are not visible and of which he does not know. *Newton v. City of Brantford*, 1 O. W. N. 966.

A licensee must at his own risk use premises as he finds them. The duty of the owner is that the licensee shall not be exposed to a trap or other concealed danger, or that the owner shall not be guilty of what may be called acts of active negligence. *Gautret v. Egerton*, L. R. 2 C. P. 371; *Bolch v. Smith*, 7 H. & N. 742; *Nightingale v. Union Colliery Co.*, 35 S. C. R. 65; *Lowery v. Walker*, 26 Times L. R. (C.A.), 108; *Graham v. Toronto Grey and Bruce R. W. Co.*, 23 U. C. C. P. 541; *Blackmore v. Toronto Street R. W. Co.*, 38 U. C. R. 172; *Perdue v. Canadian Pacific R. W. Co.*, 1 O. W. N. 667.

The duty of the municipality in opening up the road was to use all reasonable precautions to prevent the fire from spreading.

If, instead of doing the work by their own servants, they authorised a contractor to do it for them, they were bound, not only to stipulate that such precautions should be taken, but also to see that they were taken. This was of the essence of their duty, and was not a collateral matter. *Black v. Christchurch Finance Co.* (1894), A. C. 48. *Hardaker v. Idle District Council* (1896), 1 Q. B. 335, *Penny v. Wimbledon Urban Council* (1898), 2 Q. B. 212, and *Holliday v. National Telephone Co.* (1899), 2 Q. B. 392, followed. *Phillifant v. Keller*, 13 W. L. R. 293.

Bad Condition of Sidewalk—Nonfeasance and Misfeasance considered. *Brown v. City of Toronto*, 1 O. W. N. 791.

To render the master liable at common law, the injury complained of must have been directly caused by the carrying out of a defective system of performing the work, known to and sanctioned by the employer. Unless such defective system is brought home to the employer, the ordinary principles applicable to cases where one servant is injured by the negligence of another engaged in the same employment must be applied. *Smith v. Baker* (1891), A. C. 325, followed. *Laurence v. Kelly*, 13 W. L. R. 209.

Shipping—Mode of Recovering wages.—R. S. C. c. 113, the Shipping Act, provides as follows:—

187. Any seaman or apprentice belonging to any ship registered in any of the Provinces, or any person duly authorized on his behalf, may, whenever wages due to him to an amount not exceeding two hundred dollars over and above the costs of any proceeding for the recovery thereof becomes payable, sue for the same, in a summary manner, before any Judge of the Superior Court of the Province of Quebec, any Judge of the sessions of the peace, any Judge of a County Court, stipendiary magistrate, police magistrate, or any two justices of the peace acting in or near the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any master or other person upon whom the claim is made is or resides.

2. Such Judge, magistrate, or justices may, upon complaint on oath made to him or them by such seaman or apprentice, or on his behalf, summon such master or owner, or other person, to appear before him or them to answer such complaint.

188. Upon appearance of such master or owner, such Judge, magistrate or justices, may examine upon oath the parties and their respective witnesses, touching the complaint, and the amount of wages

due, and may make such order for the payment of any wages found due as appears reasonable and just.

2. If the master or owner does not appear, then on due proof of such master or owner having been duly summoned, such Judge, magistrate or justices, may examine on oath the complainant and his witnesses touching the complaint and amount of wages due, and may make such order for the payment of any amount of wages found due as appears reasonable and just.

3. Any order for the payment of wages made under the provisions of this section shall be final.

189. If such order is not obeyed within twenty-four hours next after the making thereof, such Judge, magistrate, or justices may issue a warrant to levy the amount of the wages awarded to be due by distress and sale of the goods and chattels of the person on whom such order is made, together with all the charges and expenses incurred by the seaman or apprentice in the making and hearing of the complaint, and all costs, charges and expenses incurred by the distress and levy, and in the enforcement of the order.

2. Any surplus after the amount of the wages awarded and all such charges and expenses are deducted, shall be paid to the person on whom such order is made.

190. If sufficient distress cannot be found such Judge, magistrate or justices may cause the amount of such wages and expenses to be levied on the ship in respect of the service on board which the wages are claimed, or the tackle and apparel thereof.

2. If such ship is not within the jurisdiction of such Judge, magistrate, or justices, then they may cause the person on whom the order for payment is made to be apprehended and committed under each such condemnation to the common gaol of the locality, or if there is no gaol there then to that which is nearest to the locality, for a term not exceeding three months and not less than one month.

191. No suit or proceedings for the recovery of wages under the sum of two hundred dollars shall be instituted by or on behalf of any seaman or apprentice belonging to any ship registered in any of the provinces in the Exchequer Court on its Admiralty side, or in any superior Court in any of the Provinces, unless,—

(a) the owner of the ship is insolvent within the meaning of any Act respecting insolvency from the time being in force in Canada; or

(b) the ship is under arrest or is sold by the authority of the Exchequer Court on its Admiralty side or any superior Court; or

(c) any Judge, magistrate, or justices, acting under the authority of this part, refer the case to be adjudged by such Court; or

(d) neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

192. If any suit for the recovery of a seaman's wages is instituted against any such ship of the master or owner thereof in the Exchequer Court on its Admiralty side, or in any superior Court in any of the provinces, and it appears to the Court, in the course of such suit, that the plaintiff might have had as effectual a remedy for the recovery of his wages by complaint to a Judge, magistrate, or two justices of the peace under this part, the Judge shall certify to that effect and thereupon no costs shall be awarded to the plaintiff.

193. No seaman belonging to any Canadian foreign sea-going ship, who is engaged for a voyage or engagement which is to terminate in any of the provinces, shall be entitled to sue in any Court abroad for wages, unless he is discharged with such sanction as herein required, and with the written consent of the master, or proves such ill-usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman if he remained on board.

2. If any seaman on his return to any of the provinces proves that the master or owner has been guilty of any conduct or default which, but for this section, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover in addition to his wages such compensation, not exceeding eighty dollars, as the Court hearing the case thinks reasonable.

194. Every master of a ship registered in any of the provinces shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages and for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, which by this part or by any law or custom any seaman not being a master has for the recovery of his wages.

195. If in any proceeding in any Court possessing Admiralty jurisdiction in any of the Provinces touching the claim of a master to wages, or such disbursements and liabilities as aforesaid, any right, set-off, or counterclaim is set up, such Court may enter into and adjudicate upon all questions and settle all accounts then arising or outstanding and unsettled between the parties to the proceedings and may direct payment of any balance which is found to be due.

Trade Mark.—Where a person uses a mark in ignorance that he is thereby infringing a registered trade mark, but stops the use of it as soon as the infringement is brought to his attention, he will be liable at the suit of the proprietor of the trade mark to a per-

petual injunction restraining him from infringing the registered trade mark, but he will not be liable to account for profits or to pay damages. *Slazenger v. Spalding*, 79 L. J. (Ch. 122; (1910), 1 Ch. 257.

Where, in such a case, upon motion by the proprietor of the trademark for an interim injunction, the innocent infringer offered to submit to a perpetual injunction and to pay all proper costs to date, the proprietor, having refused the offer, was made to pay the subsequent costs of the action. *Edelsten v. Edelsten* (1 De G. B. & S. 185); *Ellen v. Slack* (24 Sol. J. 290), followed. *Ib.*

Warehouseman.—See Page 316, and also *Page v. Defoe*, 24 O. R. 569.

Work and Labour.—Action for services rendered in medical attendance. *Bishop v. Stewart*, 8 E. L. R. 82. Referring to *Gibson v. McKay*, 10 O. W. R. 1081.

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LAW OF EVIDENCE IN CIVIL CASES.

PART I.

**RULES OF EVIDENCE AND PRACTICE
AT TRIALS.**



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PRACTICE AT TRIALS.

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LAW OF EVIDENCE IN CIVIL CASES.

The object of this work is to furnish a Treatise on the application in practice in civil cases of the rules of evidence. Part I. deals with the law and practice at trials. Part II. contains the requisites for proof and defence in particular actions. Part III. includes matters of law available for purposes of defence as occasion requires. A quotation from Blackstone's concise and complete summary of the general subject furnishes an introduction to Part I. It is continued throughout Part I. as the subjects are reached to which it relates. Although in one sense law is universal, reference to Canadian decisions is more satisfactory as illustrative of our system of administration. Hence, decisions of the courts of all the Canadian Provinces are the basis of the text.

PART I.

RULES OF EVIDENCE AND PRACTICE AT TRIALS

BLACKSTONE'S SUMMARY OF THE LAW OF EVIDENCE IN CIVIL CASES.

"And first, evidence signifies that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue either on the one side or on the other, and no evidence ought to be admitted to any other point. Again, evidence in the trial by jury is of two kinds; either that which is given in proof or that which the jury may receive by their own private knowledge. The former, or proofs (to which in common speech the name of evidence is usually confined), are either written or parol, that is, by word of mouth. Written proofs or evidence are: 1. Records and, 2. Ancient deeds of thirty years' standing which prove themselves, but 3. Modern deeds and 4. Other writings must be attested and verified by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required if possible to be had, but if not possible then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. One witness (if credible) is sufficient evidence to a jury of any single fact, though

undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two. Positive proof is always required where from the nature of the case it appears it might possibly have been had. But next to positive proof circumstantial evidence or the doctrine of presumptions must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily or usually attend such facts, and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur presumptioni donec probetur in contrarium*. Violent presumption is many times equal to full proof; for there those circumstances appear which necessarily attend the fact. Probable presumption arising from such circumstances as usually attend the fact hath also its due weight. The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the whole truth; so that he is not to conceal any part of what he knows whether interrogated particularly to that point or not. And all this evidence is to be given in open Court in the presence of the parties, their attorneys, the counsel, and all by-standers, and before the Judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated and by the Judge are openly and publicly allowed or disallowed in the face of the country, which must curb any secret bias or partiality that might arise in his own breast. As to such evidence as the jury may have in their own consciences by their private knowledge of facts, it was an ancient doctrine that this had as much right to sway their judgment as the written or parol evidence which is delivered in Court. And therefore it has been often held that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors to find according to the evidence was construed to be to do it to the best of their own knowledge. This seems to have arisen from the ancient practice in taking recognitions of assise. At the first introduction of that remedy the sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors when sworn being bound to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence or receiving any direction from the Judge. And the same doctrine (when attaints came to be extended to trials by jury as well as to recognitions of assise) was also applied to the case of common jurors that they might escape the heavy penalties of the attainnt in case they could show by any additional proof that their verdict was agreeable to the truth, though not according to the evidence produced, with which additional proof the law presumed they were privately acquainted, though it did not appear in Court. But this doctrine

was again gradually exploded when attainds began to be disused and new trials introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, viz., that the verdict was given without or contrary to evidence. And therefore together with new trials the practice seems to have been first introduced which now universally obtains, that if a juror knows anything of the matter in issue he may be sworn as a witness and give his evidence publicly in Court."

OBJECT OF EVIDENCE.

The object of evidence is to prove the point in issue between the parties; and in doing this there are three general rules to be kept in view: 1. That the evidence be confined to the issue: 2. That the substance of the issue only need be proved: 3. That the burden of proof lies on the party asserting an affirmative fact if it be unsupported by any presumption of law.

EVIDENCE CONFINED TO THE ISSUE.

As the object of pleading is to reduce the matters in difference between the parties to distinct and simple issues, so the rules of evidence require that no proof, oral or documentary, shall be received that is not referable to those issues. All evidence of matters which the Courts judicially notice, or of matters immaterial, superfluous or irrelevant, is therefore excluded. In general, evidence of collateral facts not pertinent to the issue is not admissible. Thus, where the question was whether beer supplied by plaintiff to the defendant was good, the plaintiff was not allowed to give evidence of the quality of beer supplied by him to other persons: *Holcombe v. Hewson*, 2 Camp. 391. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of such fact is admissible. Thus, in an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the house or the real principal, evidence is admissible to show that other persons had received orders from the defendant to do work at the same houses, without showing that the plaintiff knew of these orders at the time he did the work: *Woodward v. Buchanan*, L. R. 5 Q. B. 285. The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of \$10 an acre. In answer to the claim for rent the defendant attempted to shew that he had sustained damage by reason of the ground being full of thistles, and that it had been stipulated that an allowance was to be made in such case for the loss to the defendant:—Held, that evidence was

properly admitted for the guidance of the jury in adjusting such allowance as to how the defendant had himself settled with other persons who had thistles in their fields rented by him: *Weinhold v. Klein*, 10 A. R. 20. In an action to recover the value of buildings destroyed by fire started, as was alleged, by sparks which escaped from the defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack, is admissible to prove its defective construction; but opinion evidence that having regard to the force and direction of the wind on the day in question sparks of this size, if they escaped, might have been carried to the building in question, is too conjectural and speculative: *Peacock v. Cooper*, 27 A. R. 128.

Upon a question of skill and judgment evidence may be given of facts which, although in other respects collateral, are by means of the skill and judgment of the witness connected with and tend to elucidate the issue: *Folkes v. Chadd*, 3 Doug. 157. In order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced that he had accepted other similar bills under circumstances that indicated such knowledge or authority: *Gibson v. Hunter*, 2 H. Bl. 288. In general in actions unconnected with character, evidence as to the character of either of the parties to a suit is inadmissible, being foreign to the point in issue, and only calculated to create prejudice. For the same reason where particular acts of misconduct are imputed to a party, evidence of general character is excluded; but it is otherwise where general character is put in issue: *Farr v. Hicks*, 4 Esp. 51. When collateral issues arise out of comparison of handwriting and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally when it properly applies to it: *Royal Canadian Bank v. Brown*, 27 U. C. R. 41. Where the materiality of certain enquiries is obvious, and is assumed at the trial, e.g., with regard to the temperate habits or otherwise of the deceased, there is no need to submit it to the jury: *Russell v. Canadian Life Assurance Co.*, 32 U. C. C. P. 256, 8 A. R. 716.

Evidence
of character.

THE SUBSTANCE OF THE ISSUE NEED ALONE BE PROVED.

It was always the common law rule that **the substance of the issue joined between the parties need alone be proved**. A party must recover *secundum allegata et probata*, and cannot succeed upon a proof that differs from his allegation; if his proof so differ it is called a variance. Now, however, either party may at any time be allowed to amend their pleadings, "and all such amendments shall be made as are necessary for the advancement of justice, determining

the real matter in dispute between the parties, and best calculated to secure the giving of judgment according to the very right and justice of the case." (C. R. 312). Since this rule parties must not go to trial on the mere hope that a variance will be fatal. They ought to anticipate that all amendments will be allowed which are necessary to determine the real question in controversy which both parties must have had in contemplation when the suit commenced.

Amend-
ment, prin-
ciples on
which to be
allowed.

Although a proper amendment cannot be refused at the trial, when circumstances during its progress unexpectedly manifest a necessity for such an amendment, principle and convenience alike demand that such a motion should not be entertained in any case during the trial where by observing due diligence leave to amend might have been obtained at an antecedent period: *The Bank of Nova Scotia v. Chipman*, 2 N. S. D. 438 (N.S.). The answer of the company relied upon the premises being vacant without notice to them. At the hearing this proved to be incorrect, when an application was made to supplement their answer by relying on a change in the occupation and an increase in the number of tenants; but as it was not shewn that the change in occupation had increased the risk, or that the loss was occasioned by it, the Court in the exercise of the discretion given to it under the A. J. Act refused to allow the amendment: *Guggisberg v. Waterloo Mutual Fire Insurance Co.*, 24 Chy. 350. All amendments ought to be made that are necessary and proper, for the object of the rules is to meet cases in which by mistake or oversight the real matter in issue is not raised by the pleadings; and under it the matter may be put on the record which was not on it before if it be shown to the satisfaction of the Judge to be the existing matter in controversy. What that matter in controversy may be is a matter of fact to be determined by the Judge upon the evidence and pleadings before him: *Blake v. Done*, 7 H. & N. 465. It seems that leave to amend should always be given unless the Judge is satisfied that the party applying is acting *mala fide*, or that by his blunder he had done some injury to his opponent which cannot be compensated for by costs or otherwise: *Tildesley v. Harper*, 10 Ch. D. 397. An amendment should not be allowed for the purpose of trying a question which has arisen at the trial, but is not that which the parties came to try: *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13. Where the amendment would evade the real question in controversy it should be refused. Thus, where the plaintiff claims a larger easement than he proved at the trial, the Judge would not allow him to limit it by amendment, if in fact the larger claim was the one really claimed and asserted by plaintiff and resisted by defendant: *Cawkwell v. Russell*, 26 L. J. Ex. 34. It seems that the time to apply for an amendment by either party is at the close of his case. See *Rainy v. Bravo*, L. R. 4 P. C. 287-298. The Courts

are very unwilling to disturb decisions of Judges made in the exercise of discretion vested in them: *Morgan v. Pike*, 14 C. B. 473, and a new trial will not be directed upon the ground of surprise occasioned by an amendment at *nisi prius* unless substantial injustice has been done: *White v. S. E. R. Co.*, 10 W. R. 564.

The plaintiffs are not entitled to recover in this action; but the facts are all before us, and would warrant the granting of relief to the plaintiffs upon an amendment of their pleadings, and we proceed to treat the case as if the amendment had been made: *Rogers v. Devitt*, 25 O. R. at p. 90.

ONUS PROBANDI.

Generally he who asserts a fact is bound to prove it if there be no presumption in favour of it; and the negative need not ordinarily be proved: *Ross v. Hunter*, 4 T. R. 33. It must, however, be borne in mind that regard must be had to the effect and substance of the issue and not to its grammatical form: *Soward v. Leggatt*, 7 C. & P. 613. And where the assertion of the negative is part of the plaintiff's case, he must prove it, as, the want of reasonable and probable cause in an action for malicious prosecution: *Abrath v. N. E. R. Company*, 11 Q. B. D. 440. Where the presumption is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it; for the other party shall be presumed innocent until proved to be guilty. Thus, in an action by the owner of a ship for putting combustibles on board "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice, as the omission to give such notice would have amounted to criminal negligence on the part of the defendant: *Williams v. E. I. Company*, 3 East 193. In actions for negligence Negligence it lies on the plaintiff to prove it, and not on the defendant to show reasonable care: *Marsh v. Horne*, 5 B. & C. 327. In an action to recover damages for negligence tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant; and although the Judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury. *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100, was a non-jury case, and laid down no rule for the disposition of a case tried with a jury: *Morrow v. Canadian Pacific R. W. Co.*, 21 A. R. 149. In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also either directly or by reasonable inference that such negligence was the cause of the death: *Young v. Owen Sound Dredge Company*.

27 A. R. 649. The plaintiff's husband was accidentally killed whilst employed as engineer in charge of defendants' engine and machinery. In an action by the widow for damages, the evidence was altogether circumstantial, and left the manner in which the accident occurred a matter to be inferred from the circumstances proved:—Held, that in order to maintain the action it was necessary to prove by direct evidence or by weighty, concise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting, the action must be dismissed: *Montreal Rolling Mills Co. v. Corcoran*, 26 S. C. R. 595. The burden of proving that an accident arose out of and in the course of the workman's employment lies on the plaintiff; but the burden of proving serious and wilful misconduct lies on the defendant: *McNicholas v. Dawson*, 68 L. J. Q. B. 470; (1899) 1 Q. B. 773; 8 O. L. T. 317; 47 W. R. 500. The presumption was that the deceased had been injured by accident arising out of and in the course of his employment and that in the absence of evidence to the contrary this must be taken to be the fact: *Grant v. Glasgow and South-Western Railway*, (1908) S. C. 187. The presence of the stone in the bun was *prima facie* evidence of negligence, and threw on the defendant the onus of rebutting it: *Chaproniere v. Mason*, 21 T. L. R. 633.

It has been stated to be a rule that where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate, but the general rule applies, viz.:—that he who asserts the affirmative is to prove it, and not he who avers the negative. Thus, it has been said that in an action on a covenant for not insuring premises against fire, it lies on the defendant to prove that he is insured: *Bridger v. Whitehead*, 8 Ad. & E. 576. In actions for the recovery of possession of land upon the ground of forfeiture, it always rests on the lessor, the plaintiff, to show that the estate which he has granted has been forfeited by the tenant: *Toleman v. Portbury*, L. R. 5 Q. B. 288, Ex. Ch. In an action brought upon a policy of insurance defendants pleaded the non-fulfilment of the twelfth condition of the policy, which required the certificate of the nearest magistrate of the cause of the fire, upon which the plaintiff took issue:—Held, that the proof of the plea rested upon defendants, and the plaintiff having given *prima facie* proof of the fulfilment of the condition was entitled to the verdict: *Platt v. Gore District Mutual Fire Ins. Co.*, 9 U. C. C. P. 405. Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff: *Home Life Association v. Randall*, 30 S. C. R. 97. In an action on a bond against the sureties of the defaulting clerk of the municipality of Shelburne, the

defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it:—Held, that the plaintiffs had proved a *prima facie* case of a bond properly executed on its face, and as the defendant had not negatived the due execution of the bond, it being consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the defendant; and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover: *Marshall v. Municipality of Shelburne*, 14 S. C. R. 737.

In a suit to enforce performance of an agreement by the defendant to maintain the plaintiffs, husband and wife, in consideration of a conveyance of land by them to the defendant, the onus of proving a breach of the agreement is upon the plaintiffs: *Ouilette v. LeBel*, 26 C. L. T. 466, 3 N. B. Eq. 205.

The relations of a husband and wife are not one to which the doctrine of *Huquelin v. Baseley* (14 Ves. 273; 1 Wh. & Tu. L. C. (7th ed.) p. 247) applies. There is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The onus of proof lies on the party who impugns, not on the party who upholds the instrument: *Barron v. Willis*, 68 L. J. Ch. 604; (1892) 2 Ch. 578; 81 L. T. 321; 48 W. R. 26. A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the Court held that the onus was on the grantee of proving that the grantors understood the nature and effect of the deed; and as it did not appear to have been explained before being executed the deed was held invalid: *Fraser v. Rodney*, 11 Chy. 426; 12 Chy. 154. Where a wife claimed as agent against her husband's creditors certain chattels as a gift from him while they were living together:—Held, that the onus of proof of right to the goods was on her, and, there being no writing or witnesses, her own evidence, although corroborated by her husband, was not sufficient to satisfy the onus: *Thompson v. Doyle*, 16 C. L. T. Occ. N. 286. It is essential to the validity of a deed of gift in favour of a person occupying towards the grantor a relation of trust and confidence (in this case a brother in favour of his brothers), that the grantee should shew that the grantor had competent and independent advice in the transaction: *Dawson v. Dawson*, 12 Chy. 278. Where a father made a deed of gift of all his property to his son, and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father; and the Court was satisfied that the deed had been duly executed, the son was not required to prove that the father in making the deed was aware of its nature and consequences, and the deed was upheld: *Armstrong v. Armstrong*, 14 Chy. 528. Where there is testimony on both sides of a case,

Voluntary conveyances.

Trust and confidence

the decision is to be governed by the weight of evidence and not by the legal doctrine about burden of proof: *Andrews v. Landers*, 4 R. & G. 236 (N. S.). In an action for the annulment of a will alleged to have been procured at a time when the testator was not capable of making it, the onus of proving capacity lies upon the party procuring its execution: *Currie v. Currie*, 24 S. C. R. 712. Onus of proving property as stated in the pleas is on the defendant, and he is bound to begin: *Graham v. Wetmore*, 4 All. 373 (N. B.). Defendants in an action for wrongful dismissal sought to justify the dismissal on the ground that plaintiff was incapable of doing the work he had contracted to perform:—Held, that the burden of proving incapacity was on defendants: *Jeykel v. Nova Scotia Glass Co.*, 20 N. S. R. (8 R. & G.) 388; (N. S.) 9 C. L. T. 60. The fact of bank shares being purchased in trust at a time when the trustee was insolvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available to satisfy the demand of his creditor: *Sweeny v. Bank of Montreal* (12 App. Cas. 617; 12 S. C. R. 661), followed: *Holmes v. Carter*, 16 S. C. R. 473. In an action of slander against a public officer in respect of the communication of his decision on the case of a subordinate whom he accused of criminal acts, the onus is upon the plaintiff to shew that the slanderous statement was actuated by motives of personal spite and ill-will in order to sustain a verdict for malicious slander. See 3 Pugs. 670; 18 N. B. Rep. 6; 19 N. B. Rep. 225: *Dewe v. Waterbury*, 6 S. C. R. 143. Whether a memorandum in writing set up by the defendant was or was not intended to settle a contract in whole or in part is a question for the jury, and the onus to shew that it settled the whole contract being upon the defendant, and oral testimony admissible on behalf of both parties, a verdict based on the appreciation of the credulity of the respective witnesses ought not to be interfered with: *Peters v. Hamilton*, *Cass. Dig.* (2nd ed.), 763. In an action against charterers of a vessel for non-delivery of goods shipped under a bill of lading, if the defendant claims that the damages should be reduced by a claim for general average, the burthen is on him to establish the liability and shew the amount: *Burpee v. Carville*, Pugs. 141 (N. B.). See *Thompson v. Didion*, 10 Man. Rep. 246; referring to *Barber v. Furlong* (1891), 3 Ch. 184.

Contract
in writing.

Solicitor
and client.

In dealing with a case of a gift by a client to his solicitor the Court starts with a presumption of undue influence on the part of the donee continuing so long as the relation of the solicitor and client, or the influence attributable thereto, continues. The presumption is not irrebutable, but the onus is on the solicitor of shewing the gift was uninfluenced by his position of solicitor. The fact that the donor had the competent independent advice of a different solicitor is material as tending to shew that the influence had ceased.

But the new solicitor called in must not only satisfy himself that the donor knew what he was doing and did it of his own will; he must also inform himself of the donor's financial position, and the circumstances under which the transaction was taking place, and satisfy himself that the gift was proper for the donor to make under all the circumstances of the case; otherwise he will not be in a position to give competent independent advice. In a transaction of sale from a client to his solicitor the onus is on the solicitor to shew that the client knew what he was doing, that he was properly advised, and that a fair price was given: *Wright v. Carter*, 72 L. J. Ch. 138; (1903) 1 Ch. 27; 87 L. T. 624; 51 W. R. 196. Action to set aside a conveyance obtained from an old woman, who was deaf and unable to write and who had no relatives or friends, by the reeve of the township in which she lived, and who was well known as a justice of the peace and an active, shrewd business man, engaged in many enterprises; the plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she, however, having sworn in her evidence that she never placed any dependence on him, the plaintiff's case was closed, and it was contended that the onus was now on the defendant to shew that the transaction was a righteous one; the defendant declined to call any witnesses, and plaintiff's action was dismissed:—Held, that the onus was not on the defendant, and that the plaintiff must prove her case. Semble, the mere existence of confidence is not enough; influence must be proved, and is not to be presumed from the existence of confidence: *Wallis v. Andrews*, 16 Chy. 624, followed; *McEwan v. Milne*, 5 O. R. 100. If a person executes a transfer with a mind and intention to execute it, though his assent may have been obtained by fraud he is estopped from denying its validity as against subsequent purchasers, *bona fide* Subsequent purchasers. for value and without notice; but when fraud has been established, the onus is upon such subsequent purchaser to establish that the transfer to him was *bona fide* and the Court in determining whether such defence is established will take into consideration all the facts, and draw inferences therefrom as to whether or not the transaction was in fact *bona fide*: *Swanson v. Getsman*, 8 W. L. R. 762; *McInnis v. Getsman*, 1 Sask. L. R. 172. In proceeding to impeach a conveyance executed in pursuance of a power of sale in a mortgage, the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the deed: *Bartlett v. Jull*, 28 Chy. 140. Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative: *McIntyre v. Attorney-General*, 14 Chy. 86. It is not incumbent upon a paten-

- Patent of invention.** tee to shew that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to shew that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor: *Barter v. Smith*, 2 Ex. C. R. 455. Where in an action for infringement of a patent for invention the validity of the patent is attacked upon the ground that the invention is not patentable, the onus of proving that it is is upon the patentee: *Lair v. Authier*, Q. R. 31 S. C. 112. In an action by a municipal corporation to restrain the owner of the land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs: *St. Vincent v. Greenfield*, 15 A. R. 567. Where a collision occurs between a moving vessel and one lying at anchor, the burthen of the proof is upon the moving vessel to shew that such collision was not attributable to her negligence: *The Annot Lyle*, 11 P. D. 114, referred to; *Ward v. The Ship "Yosemite"*, 4 Ex. C. R. 241. In an action on a foreign judgment, if the judgment is not impeached or denied, it is *prima facie* evidence against the defendant. In an action on a judgment obtained by plaintiff against defendant in the United States defendant pleaded: 1. That the judgment had been recovered for money alleged to have been paid by plaintiff for the use of the defendant, and that he was never indebted as alleged. 2. Payment before judgment:—Held, that the *onus probandi* was upon defendant, who ought to have begun, and that he having refused to do so a verdict was properly entered for the plaintiff: *Manning v. Thompson*, 17 U. C. C. P. 606. In an action on a covenant for title where defendant pleads that he was seized in the terms of the covenant, the onus of proof lies upon him, and the plaintiff need not first prove a breach to entitle himself to a verdict: *Lemesurier v. Willard*, 3 U. C. R. 285. Upon an action on covenant for title of an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is that he has not the interest he supposed he was acquiring which he would have had if the title of the covenantor who executed the first deed had been good: *Gamble v. Rees*, 6 U. C. R. 396. In a suit to set aside a voluntary conveyance as void against creditors, it lies upon the parties interested in supporting the deed to shew the existence of other property of the debtor available to his creditors: *Brown v. Davidson*, 9 Chy. 439.
- Foreign judgment.**
- Highway.**
- Collision.**
- Covenant for title.**
- Infancy.** Where an action is brought for the price of goods sold and delivered and the defendant pleads and proves infancy, the onus is on the plaintiff to prove that the goods were necessities within the meaning of that term as defined in section 2 of the Sale of Goods Act, 1893, that is to say, that the goods were suitable not only to condition in life of infant but also to the actual requirements at the time of the sale and delivery: *Nash v. Inman*, 77 L. J. K. B. 626;

(1908), 2 K. B. 1; 98 L. T. 658; 24 T. L. R. 401—C. A. The onus of proving that the signature on a bill is genuine lies on the holder of the bill: *British Linen Co. v. Cowan*, 8 F. 704. Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part: *Phipps v. New Claridge's Hotel, Lim.*, 22 T. L. R. 49. Those who rely on a plea of compulsory pilotage must establish the fact that the fault of the pilot was the fault of the pilot alone, otherwise the Court will not act in finding that the fault was that of the pilot: *The Velasquez* (36 L. J. Adm. 19; L. R. 1 P. C. 494) approved: *The Benmohr*, 52 W. R. 686. In the absence of notice brought home to the customer, that their liability was limited to a certain sum, the defendants had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants, had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract: *Harris v. Great Western R. W. Co.* (1876), 1 Q. B. D. 515; *Henderson v. Stevenson* (1875), L. R. 2 H. L. Sc. 470, and other cases bearing on the liability of carriers: *Lamont v. Canadian Transfer Co.* (1909), 13 O. W. R. 1181; 19 O. L. R. 291.

It is not necessary for the defendant to explain the cause of the fire. The burden is on the plaintiffs of showing that it was caused by the defendant: *Clarke v. Ward*, 13 W. L. R. 83.

Fraudulent Conveyance—Onus of Proof under R. S. O., c. 124: *Lawson v. McGeoch*, 20 A. R. 464.

Where a man of sufficient age for business capacity knowingly enters into a contract of service which is only in partial restraint of trade the onus lies on him to prove that it goes beyond what was reasonably necessary: *Haynes v. Doman* (1899), 2 Ch. 13.

PRIMARY EVIDENCE.

It is a general rule that **the best evidence, or rather the highest kind of evidence, must be given of which the nature of the case admits**, and evidence of a nature which supposes better proof to be withheld in only secondary evidence. Thus in general where a contract has been reduced into writing by the parties, the writing is the best evidence of its contents and must be produced: *Fenn v. Griffith*, 6 Bing. 533. It is not universally necessary where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, the fact may yet be proved by oral evidence. Thus, a receipt for money will not exclude oral evidence of the payment: *Rambert v. Cohen*, 4 Esp. 213. In the

same manner what a party says in admitting a debt is evidence, although the promise to pay is reduced into writing: *Singleton v. Barrett*, 2 C. & J. 369. The parties to a lease, amount of rent, and the terms of the tenancy can only be shewn by the writing: *Strother v. Barr*, 5 Bing. 136. Although there exists the deed of partnership, yet the fact of partnership may be proved by the acts of the parties: *Alderson v. Clay*, 1 Stark, 405. Where it is necessary to prove a marriage, the entry in the parish register is not the only evidence; but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or by general reputation: *Campbell v. Campbell*, L. R. 1 H. L. Sc. 201. The admission of one of the parties to a suit is primary evidence as against him, and oral admissions are evidence against the party making them although they relate to the contents of a written document: *Slutterie v. Pooley*, 6 M. & W. 664. The counterpart of a deed is admissible as original or primary evidence against the party executing it and those claiming under him, though no notice to produce the other part has been given: *Burleigh v. Stibbs*, 5 T. R. 465. So a duplicate original may be adduced in evidence without notice to produce the other original: *Colling v. Treweek*, 6 B. & C. 394. In the case of printed matter each copy of the same impression is an original: *R. v. Watson*, 2 Stark. 129. A mere unaccepted proposal, executory memorandum, private minute or unauthorized entry of one of the parties will not exclude oral proof. But where an oral contract expressly incorporates or refers to a written paper as part of its terms, that paper ought to be produced, in order to prove those terms. In order to render the production of a writing necessary it must appear to relate to the matter in question: *Hill v. Nuttall*, 17 C. B. N. S. 262. If, in an action for work and labour it appears that the claim is for extras on a written contract the written contract must be produced: *Buxton v. Cornish*, 12 M. & W. 426. But if an entirely separate order be given for the extras, then production of the written contract is not necessary: *Reid v. Batte*, M. & M. 413. If oral evidence of an agreement is given at the trial the party desirous of excluding it may at once interpose and ask the witness whether it was not in writing; if the witness deny this, he may then give evidence on collateral issue to shew that the agreement was in writing: *Cox v. Couveless*, 2 F. & R. 139; or he may reserve the question for cross-examination, and may enquire as to the contents of the writing so far as may be necessary to shew that oral evidence is admissible: *Curtis v. Greated*, 1 Ad. & E. 167. It is not enough to prove by a witness that the solicitor of the opposite party has admitted in conversation that there was a written agreement on the subject; for a solicitor is not an agent of his client to make such admissions: *Watson v. King*, 3 C. B. 608. Evidence was properly admitted as tending to shew that the defendant's mode of carrying on his business was dangerous:

Duplicate
original.

Extras.

Exclusion
of oral
evidence
of agree-
ment.

Hales v. Kerr, 77 L. J. K. B. 870; (1908), 2 K. B. 601; 99 L. T. 364; 24 T. L. R. 779.

JUDICIAL NOTICE.

It is no longer necessary to tender evidence as to the negotiability of bearer bonds foreign or English. The existence of the usage has been so often proved that it must now be taken to be part of the law of which the Courts ought to take judicial notice: *Bechuanaland Exploration Co. v. London Trading Bank*, 67 L. J. Q. B. 986; (1898), 2 Q. B. 658, approved of and followed: *Edelstein v. Schuler*, 71 L. J. K. B. 572; (1902), 2 K. B. 144; 87 L. T. 204; 50 W. R. 493; 7 Com. Cas. 172:—Held, that a magistrate cannot take judicial notice of orders-in-council or their publication, without proof thereof by production of the Official Gazette; and, therefore, that a conviction was bad which was made without evidence that the Canadian Temperance Act, 1878, was in force in the county pursuant to the terms of s. 96 thereof: *Regina v. Bennett*, 1 O. R. 445, 3 O. R. 45. A Judge is bound to take notice of the territorial divisions of the Province: *McDonald v. Dicaire*, 1 Ch. Ch. 34. The Court will take judicial notice of the territorial divisions of the Province: *Eastern Judicial District v. Winnipeg*, 3 M. L. R. 537 (Man.).

While the courts will take judicial notice of territorial and geographical divisions, they will not so notice the precise extent or limits of the various counties and divisions; nor whether particular places are or are not situated therein. *Rea v. Oberlander*, 13 W. L. R. 648.

SECONDARY EVIDENCE.

Secondary evidence is admitted in cases where the principle which excludes it, namely, the supposed existence of better evidence behind, which it is in the power of the party to produce, does not apply. Thus, it is admissible if a ground be laid for it by proving that better evidence cannot be obtained: *Rainy v. Bravo*, L. R. 4 P. C. 287. In cases of a lost deed the loss or destruction must be proved; and if it appears that two or more parts have been executed, the loss of all the parts should it is said be proved; otherwise, "perhaps," a copy will not be admitted: *Munn v. Godbolt*, 3 Bing. 292. So when an instrument is in the possession of the opposite party, oral evidence of its contents may be given on proof of the service of a notice to produce it. All the proper sources from which the primary evidence can be procured must be exhausted before secondary evidence can be admitted. Thus a

party who has the legal custody of an instrument must be applied to: *R. v. Stoke Golding*, 1 B. & A. 173. The construction of a lost document though proved by oral evidence is for the Judge, where the veracity of the witness as to its contents is not questioned: *Berwick v. Horsfall*, 4 C. B. N. S. 450. The wrongful refusal of a third party to produce a document in his possession on *subpœna duces* will not let in oral evidence of it: *St. v. Llanfaethly*, 2 E. & B. 940. But where a document is in the hands of a party as a solicitor, who is called to produce it, but declined to do so, relying upon his privilege or upon his lien, secondary evidence of its contents may be given: *Gilbert v. Ross*, 7 M. & W. 102. The secondary evidence cannot be received unless the solicitor has been duly served with a *subpœna duces*: *Hubberd v. Knight*, 2 Exch. 11; or has the document in Court and refuses on demand to produce it. In some cases secondary evidence of oral testimony is admitted, as where the testimony of a witness on a former trial is admitted on another trial without producing him in person. What a witness since dead has sworn on the trial between the same parties may be proved, either from the Judge's notes or from notes that have been taken by any other person who will swear to their accuracy; or it may be proved by any person who can swear from memory: *Strutt v. Bovingdon*, 5 Esp. 56. The witness must be prepared to prove the words of the former witness and not merely the supposed substance or effect of them: *R. v. Jolliffe*, 4 T. R. 285. Where secondary evidence is offered in consequence of the loss of the primary evidence, it must be shewn to the satisfaction of the Judge that diligent search has been made in those quarters in which the primary evidence was likely to be procured. Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction will be required, and a useless paper will be presumed to be destroyed: *R. v. E. Farleigh*, 6 D. & Ry. 153. A party who relies upon a title deed which he asserts to have existed, but which he cannot find, may establish the existence, the tenor, and the destruction of it as well by oral evidence as by presumptions grave, precise, and sequential: *Bienvenu v. Lacaille*, Q. R. 17 K. B. 464.

Where a party to an action has had an opportunity of inspecting and taking copies of documents belonging to his opponent and privileged from production, he can, notwithstanding the privilege, give secondary evidence of the contents of such documents: *Lloyd v. Mostyn*, 12 L. J. Ex. 1; 10 M. & W. 478, followed; *Calcraft v. Guest*, 67 L. J. Q. B. 505; (1898), 1 Q. B. 759; 78 L. T. 283; 46 W. R. 420.

The degree of diligence to be used in searching for a deed must depend on the importance of the deed and the particular circumstances of the case: *Gully v. Bp. of Exeter*, 4 Bing. 298. If not found

in its proper place of deposit further search may generally be dispensed with; as where it was the duty of the party in possession of the document to deposit it in a particular place, and it is not found in that place the presumption is that it is lost or destroyed.

If there are several places of probable deposit all should be searched. Where a conveyance of freehold and leasehold in trust was alleged to be lost, and one of the trustees and the heir of another trustee deceased negatived possession of it, it was held insufficient unless the executor of the deceased trustee who had taken possession of his papers was also questioned: *Richards v. Lewis*, 11 C. B. 1035. The objection that secondary evidence of a document is offered without proof of due search for the original must be distinctly made at the trial; otherwise the Court will not entertain it on a motion for a new trial: *Williams v. Wilcox*, 8 Ad. & E. 314. **There are no degrees of secondary evidence;** or in other words, if the production of the original document is dispensed with, its contents may be proved by the same evidence as any other fact is capable of being proved; and no other restriction is laid upon the party producing the evidence as to the kind of evidence which he shall produce for this purpose except that which arises from the risk of having it treated as unsatisfactory by the jury. This is what a jury would very probably do and might possibly by a Judge be advised to do, if it was patent that more satisfactory evidence was available to the party than that which he thought fit to produce: *Gilbert v. Ross*, 7 M. & W. 402. The only exception is where, as in the case of public documents, a special kind of secondary evidence is substituted for the original. Even in this case if good reason can be shewn why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible: *Atwood v. Young*, Ry. & M. 392.

It is a general custom, especially of persons in business, to get Copies. copies of all the more important documents relating to the matters in which they are engaged; and there is no doubt that a well authenticated copy is by far the most satisfactory substitute for the original documents.

No copy is admissible in evidence unless its accuracy be sworn to, or there be some presumption attached to it from which its accuracy may be inferred: *Fisher v. Samuda*, 1 Camp. 190. It is not necessary to call the very person who wrote the copy. Any person who can testify on oath to the accuracy of it is sufficient: *Everingham v. Roundell*, 2 M. & Rob. 138. A copy of a letter taken by a copying machine, though still only a copy, will be presumed to be a correct copy: *Simpson v. Thornton*, 2 M. & Rob. 433; and may be used as an admission: *Nathan v. Jacob*, 1 F. & F. 452. An entry by the plaintiff's deceased clerk in a letter book, purporting to be a

copy of a letter from the plaintiff to the defendant, is presumed to be correct, proof being given that according to the course of business, letters of business written by the plaintiff were copied by this clerk: *Hagedorn v. Reid*, 3 Camp. 377. A letter written by defendant to plaintiff stating that he was still willing to settle amicably, but that if the plaintiff refused to meet him in the same spirit he would push the matter to the utmost:—Held, not provable by secondary evidence without a notice to produce: *Hood v. Cronkite*, 29 U. C. R. 98. Held, per Wilkins, J., that where one of the originals of an agreement between defendants L. and F. had been in the possession of L., and no evidence was given of a search by L., or by L.'s executors or among papers of deceased for it, secondary evidence of the agreement had been improperly received: *Johnson et al. v. Lithgow et al.*, 2 R. & C. 567 (N. S.). After secondary evidence of a document has been received it is too late to object to the sufficiency of the search: *Maclem v. Turnbull*, 5 U. C. R. 129. Secondary evidence of the deed having been admitted, the Court after verdict refused to interfere: *Tiffany v. McCumber*, 13 U. C. R. 159. Before secondary evidence can be let in proof must be adduced that such deed once existed, and that it had been destroyed or lost and diligent search made therefor: *Ansley v. Bero*, 14 U. C. C. P. 371. A memorandum or entry in a book in the office of the sheriff in the handwriting of the deputy-sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence subject to objection, the sheriff and the then deputy-sheriff being dead, and the existing deputy-sheriff having proved the handwriting and the place from which the book was produced: *Ward-robe v. Canadian Pacific R. W. Co.*, 7 O. R. 321. Where the papers belonging to the District Court and to the sheriff had been burned, and the records themselves thus destroyed:—Held, in ejectment, that the defendant claiming under a sheriff's deed might prove the judgment and executions by secondary evidence contained in the sheriff's books, and in a fee book of the Court, and by the attorney who obtained the judgment, whose papers had also been burned, and by the plaintiff; and that he was not bound to obtain exemplifications: *Heany v. Parker*, 27 U. C. R. 509. Where a deed has been traced into the actual possession of a party, it is necessary to call him to account for it, before secondary evidence can be let in; but where doubt exists as to whether it was actually left with a party who had no interest in it: Held, sufficient to prove a search amongst the papers of the person who it was presumed had last had possession of it: *Barto v. Morris, Cochran*, 90 (N. S.). Slight evidence of a search for a note which has been paid and taken up by the maker is sufficient to account for its non-production and to admit secondary evidence: *Lyman v. Cain*, 3 All. 259 (N. B.). The sufficiency of preliminary proof of the loss of any document to entitle secondary evidence to be received is a question for the Judge at the trial to determine:

Gilbert v. Campbell, 1 Han. 474 (N. B.). Where an objection to secondary evidence of a deed is either not taken or is waived at the trial, it cannot be taken afterwards; and in such case the regularity of notices to produce and matters of the like kind is always presumed: *Smith et al. v. Smith et al.*, 2 Old. 303 (N. S.). A document not in existence written by a particular individual may be proved by a person who has had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed, and could only say that from his recollection of the document it was written by the same person: *Alexander v. Wye*, 14 S. C. R. 501. On the hearing of an equity suit secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking for it, and to his sister and other persons connected with him inquiring as to his whereabouts, but information was not obtained: Held, affirming the decision of the Supreme Court of New Brunswick, that this was not a sufficient foundation for secondary evidence; and the letters should have stated that this specific paper was wanted; that an independent person should have been employed to make inquiries in Scotland for the custodian of the document, and to ask for it if he had been found; and that a commission might have been issued to the Court of Session in Scotland, and a commission appointed by that Court to procure the attendance of the custodian and his examination as witness: *Porter v. Hale*, 23 S. C. R. 265.

ORAL EVIDENCE TO EXPLAIN OR ADD TO DOCUMENTS.

The rule of law is clear that, where a contract is reduced into writing it is presumed that the writing contains all the terms of it, and evidence will not be admitted of any previous or contemporaneous oral agreement which would have the effect of adding to or varying it in any way. This is a rule of evidence at common law.

The Statute of Frauds also requires that certain contracts should be in writing, and therefore by implication evidence which is not in writing relating to such contracts is excluded.

In other cases it is the duty of certain officers to record, in a manner more or less solemn, what is said or done; as in the case of records of Courts of law. How far such authentic memorials are conclusive is not very well settled, but they are certainly so in some cases.

It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and where several objections

might be good, it is not always easy to see which of the two in a particular case forms the *ratio decidendi*. The cases which we are about to consider are those where the decisions have been founded or seem likely to have been founded *on the common law rule* now under consideration. Another remark which appears to be useful is this: and although the principles upon which the admissibility of evidence in these cases depends would appear to be general as regards all written instruments, they have not been applied in a precisely similar manner to all classes of cases. But perhaps this may be partly explained in the following manner. Inasmuch as the question is whether the written memorandum by its terms excludes oral evidence, the admissibility of the latter is in all cases to a certain extent, and in some exclusively so, a question of interpretation of the written document. And inasmuch as, in analogy to the use of technical terms, language, by being constantly used for the same purpose, almost always acquires conventional meaning, such corresponding groups of cases as have been mentioned naturally arise. In fact there are two questions of interpretation to be solved whenever oral evidence is objected to on the ground that it contradicts a written instrument. First, the interpretation of the written contract as it stands; secondly, the interpretation of the clause which it is proposed to insert by way of addition or explanation, for that is really what is done; and this explains how it is that the same question as that which is raised upon the admissibility of evidence was formerly sometimes raised upon demurrer. Where a party endeavours to prove by oral testimony the contents of a written document, the Court before giving effect to such testimony should be convinced that all the terms have been proved. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the Court may be able to give effect to all its provisions, and that by testimony of the clearest nature. The document need not be set forth in evidence in its very words, but its exact sense and effect must be shewn: *Ross v. Williamson*, 14 O. R. 184. Where parol evidence is admissible to control the legal operation of a deed, no effect can be given to such evidence if contradictory or its accuracy is involved in doubt: *Re Browne*, 2 Chy. 590. An instrument under seal may be varied in equity by an agreement for valuable consideration not under seal: *Brown v. Deacon*, 12 Chy. 198. Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties: *Christie v. Burnett*, 10 O. R. 609. For the purpose of the interpretation of an agreement, the terms of which are ambiguous, evidence of witnesses in regard to circumstances, such as the manner in which the parties have executed it, and a prior agreement for the same purposes, is

admissible: *Gregoire v. St. Charles de Bellechasse*, Q. R. 29 S. C. 215. Evidence is admissible to explain the circumstances under which an instrument was executed, including the facts known to the parties. The Court will not readily adopt a construction of a deed which will nullify the rights given under it to one of the parties: *Butterley Co. v. New Hucknall Colliery Co.*, 78 L. J. Ch. 63; (1909) 1 Ch. 37; 99 L. T. 818; 25 T. L. R. 45 C. A. The construction of a contract cannot be affected by the declarations of the parties made subsequent to its date, though when words are ambiguous they may be explained by the previous or contemporaneous conduct of the parties. The appellants chartered vessels for the carriage of coal sold by them specifying the rate of delivery and the amount payable by the respondent for demurrage. The charges for demurrage under the contract exceeded those payable by the appellants to the owner under the several charterparties:—Held, that the respondent was liable for the rates stated in the contract irrespectively of the terms of the charterparties, and that there was no trust or contract of agency between the parties. Also that, delivery of the several cargoes having been accepted by the respondent, the appellants were not precluded from recovering demurrage by any breach of contract committed by them. The only remedy of the respondent in that case was to sue for damages in respect of such breach. *Houlder v. Commissioner of Public Works*, 77 L. J. P. C. 58; (1908) A. C. 276; 98 L. T. 684; 11 Asp. M. C. 61. An oral term can only be added to a written agreement by clear and unequivocal testimony. A memorandum in writing, signed by the seller, not to carry on business in competition with the purchaser, and made after the sale was completed, and not being a term of the original agreement, is not supported by the original consideration, and cannot be enforced: *Mund v. Busch*, 7 W. L. R. 305; 1 Sask. L. R. 227.

Where one consideration is stated in a deed, any other consideration that does not contradict the instrument may be proved. Proof of a larger consideration than that stated does not contradict the instrument: *Frith v. Frith*, 75 L. J. P. C. 50; (1906), A. C. 254; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388. Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible in an action upon the bill: *New London Credit Syndicate v. Neale*, 67 L. J. Q. B. 825; (1898), 2 Q. B. 487; 79 L. T. 323:—Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand was not admissible: *Porteous v. Muir*, 8 O. R. 127. Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified: *Davis v. McSherry*, 7 U. C. R. 490. Where a written contract exists, parol evidence may be given to prove a verbal warranty respecting a

Proof of consideration.

Warranty, matter on which the written contract is wholly silent. Such evidence is not admissible so far as to enlarge the scope of a warranty which is contained in the written contract: *Lloyd v. Sturgeon Falls Pulp Co.*, 85 L. T. 162. Evidence of parol misrepresentation is admissible although a written warranty was given: *Watson Manufacturing Co. v. Stock*, 4 M. L. R. 146 (Man.) See *Grand Trunk Railway Company v. Fitzgerald*, 5 S. C. R. 204. Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement unless mistake is expressly charged: *McDonald v. Rose*, 17 Chy. 657. Although parol evidence is admissible to prove rescission of a written agreement concerning land, such evidence cannot be given to prove a subsequent agreement to vary the terms of the written agreement: *Vezev v. Rashleigh*, 73 L. J. Ch. 422; (1904), 1 Ch. 634; 90 L. T. 663; 52 W. R. 442. The principle upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on. *Le Targe v. De Tuyll*, 1 Chy. 277, commented on and approved of: *Bernard v. Walker*, 2 E. & A. 121. A conversation prior to a written agreement under seal cannot be received to alter its terms: *Gilpin v. Greene*, 7 U. C. R. 586. Parol evidence was held admissible to identify a mortgage as the instrument enclosed in a letter mentioning it: *Ward v. Hayes*, 19 Chy. 239. Upon the question whether a deed absolute in its terms was really intended as a security merely, an unsigned memorandum of the transaction made at the time for the use of the parties by the attorney's clerk who drew the deed for them was held sufficient to let in parol evidence. Parol evidence does not become admissible in this class of cases because of a note in writing sufficient to take the case out of the Statute of Frauds, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed in the deed: *Holmes v. Mathews*, 3 Chy. 379. The amount mentioned in a conveyance as the consideration money is not conclusive evidence of the true consideration in favour of the vendor on a bill filed by him impeaching the transaction on the ground of inadequacy of price: *Shank v. Coulthard*, 19 Chy. 324. The true consideration for a bill of sale must be set out in it with substantial accuracy: *Bathgate v. Merchants' Bank*, 5 M. L. R. 210 (Man.). The Court will receive parol evidence to rectify a written instrument notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was the intention and agreement of the parties: *Merritt v. Ives*, 2 O. S. 25:—Held, that the rule that the Court will not interfere to rectify an instrument on parol evidence on the ground of mutual mistake, when the defendant denies that there was such mutual mistake, only applies where the defendant so denying was a party to the instrument in question: *Ferguson v. Winsor*, 10 O. R. 13; S. C., in appeal, 11 O.

Effect of
alleged
deed.

Mutual
mistake.

R. 88. D. agreed to purchase certain lands as agent for K., and Agency accordingly executed an agreement for the purchase of the same in her own name:—Held, that evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of A. Quere, whether *Bartlett v. Pickersgill*, 1 Cox 15, 4 East, 577 (n), is still to be regarded as good law: *Kitchen v. Dolan*, 9 O. R. 432. Where the purchase was made by a person in his own name, but in reality for the benefit of another, parol evidence of the agency was held admissible, and the purchaser who entered into the contract in his own name and who was a defendant was held a good witness on behalf of the plaintiff against his co-purchaser the other defendant: *Sanderson v. Burdett*, 18 Chy. 417. Parol evidence is admissible to reform a mortgage which omitted land shewn by the mortgagor to the mortgagee as part of the property to be mortgaged: *Merchants Bank of Canada v. Morrison*, 19 Chy. 1. Quere as to the admissibility with a view to the construction of a statute of the language used by the Secretary of State for the Colonies in introducing it in Parliament: *Smiles v. Belford*, 1 A. R. 436. A by-law to establish a road must on its face shew the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence: *Township of St. Vincent v. Greenfield*, 12 O. R. 297. A chattel mortgage of certain timber was expressed to be given in consideration of the payment of \$300 to the mortgagor, all the covenants and provisions being applicable to a money payment or default therein. At the trial, it was endeavoured by parol evidence to shew that upon the delivery of certain pieces of timber sold by the father of the mortgagor to the mortgagee the whole of the provisions of the mortgage were to become ineffective, and the mortgagee be prevented from claiming payment of the sum stipulated for in the manner and at the time set forth:—Held, that the parol evidence was inadmissible: *Tyson v. Abercrombie*, 16 O. R. 98. Where a party, being in close Fraud. custody at the suit of another, agreed to execute a conveyance to him as security for his debt and costs, and executed an assignment accordingly, but the instrument was deemed in law an absolute assignment giving the assignor a right of re-purchase, and after the day of payment had elapsed this was set up as a bar to the party's right to redeem, parol evidence was admitted on the ground of fraud: *Stewart v. Horton*, 2 Chy. 45. Although extrinsic parol evidence Identify. may be given to identify one of the parties it cannot be given to ing party. supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made or for whom it was intended: *White v. Tomalin*, 19 O. R. 513. Action for wrongful distress. The plaintiff produced a receipt dated 3rd March, 1860, for rent to date:—Held, that parol evidence was

Construction of statute.

By-law.

Fraud.

Identify. ing party.

admissible to explain the circumstances under which the receipt was given, but not to vary or control it: *Baskerville v. Doan*, 12 U. C. C. P. 127. The plaintiff sought to restrain the defendant from cutting timber on lands demised to him contrary to the covenants in the lease. At the trial, defendant tendered parol evidence of an agreement between himself and the plaintiff distinct from and prior to the lease, which he contended modified the restrictions in the lease and gave him the right to cut the timber:—Held, that evidence of the parol agreement could not be admitted: *Gilroy v. McMillan*, 6 O. R. 120. In ejectment the plaintiff proved a patent to himself which had been in his possession since 1803. Defendant claimed under a deed from A. to B., executed in 1806. A. was not shewn to have been in possession and no deed from the plaintiff to A. was produced, nor any evidence given that he had ever executed such a deed; the facts proved only went to shew a bare probability that he might have done so:—Held, that there was no legal evidence for the jury on the facts stated to shew an alienation by the patentee: *Petit v. Renard*, 6 U. C. R. 501. As to admissibility of extrinsic evidence to explain the capacity in which the maker signed a promissory note: See *Brown v. Howland*, 9 O. R. 48; 15 A. R. 750. When a proposal is made in writing by one party and accepted ad idem by the other, either verbally or by acting upon it, the contract is a written one: *Ellis v. Abell*, 10 A. R. 226. Semble, that the fact of agency may be proved by parol though the appointment was in writing: See *Wilson v. Street*, 3 All. 251. (N.B.). A latent defect in a grant cannot be remedied by parol evidence. In order to correct an error in the description part of any grant by parol evidence, the evidence must be such as to leave no doubt of the intention of the grantor: *Brennock v. Fraser*, James. 178 (N.S.). The defendant having given a written order to the plaintiffs for a binder, it was delivered to him, but he afterwards returned it claiming that he was not satisfied with it. At the trial the evidence shewed that either at the time of the negotiations or after the order had been signed a verbal agreement had been made between the defendant and the plaintiff's agent to the effect that if the binder did not work to the defendant's satisfaction he might return it:—Held, following *Mason v. Scott*, 22 Chy. 592, that if the condition sought to be proved was agreed to at the time of the signing of the order parol evidence of it could not be received, as it would be a variation of and contradictory to the written contract; and if subsequent to the signing of the order no consideration for the plaintiff's entering into it had been proved; and that the plaintiff's verdict should be upheld: *Lindley v. Lacy*, 17 C. B. N. S. 578; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756, distinguished, on the ground that in each of these cases the verbal agreement sought to be proved was collateral and on a subject distinct from that to which the written contract related: *Saults v. Eaket*, 11

Latent
defect.

Condition-
al contract

M. L. R. 597 (Man.). When a contract is to be made out partly by written document and partly by parol evidence, the whole becomes a question for the jury: *Macpherson v. Fredericton Boom Co.*, 1 Han. 336 (N.B.).

To decide whether a document is or is not a bill of sale, the Court must look into the real transaction between the parties: *Beckett v. Tower Assets Co.*, C. A. 1891, 1 Q. B. 638. To determine whether a hire purchase agreement be a real sale with conditions of re-purchase, so as not to require registration as a bill of sale or a mortgage, in the form intended to evade the Bill of Sale Acts, the Court must consider the true nature of the documents in dispute: *United Loan Club v. Bexton* (1891), 1 Q. B. 28n.

A bonus "is a boon or gift over and above what is nominally due to the receiver, and is therefore something wholly to the good;" therefore, the occurrence of the word in a share certificate puts a purchaser more on enquiry: *Re Eddystone* (1894), W. N. 30.

PRESUMPTIVE EVIDENCE.

Presumptive evidence is usually so called in contradistinction to direct or positive proof whether written or oral; though all moral proof is in strictness founded on probability and presumption. Thus, a fact attested by the direct evidence of an ocular witness can only be admitted to be true on the presumption that the witness neither deceives nor is deceived; perhaps, the principal distinction is, that what is usually called a presumption may be rebutted without necessarily impugning the testimony upon which it rests; but direct testimony cannot be impeached without attacking its credibility. Presumptive evidence is not in its true nature secondary to direct evidence. Thus payment of rent may be proved by the positive evidence of a person who saw it paid; yet it may also be proved by the production of a receipt for later arrears which affords a presumption that the earlier arrears are satisfied, without laying any ground for the introduction of such evidence by shewing that positive evidence cannot be procured: *Welsh v. Langsfeld*, 16 M. & W. 513. **Some presumptions are artificial and legally admit of no contradiction by contrary evidence;** e.g., some damage is conclusively presumed to result from an unlawful act done by the defendant and actionable per se. If a party withhold from inspection a book containing entries relating to the matters in question in the cause on the ground that it is private, it will be taken to contain evidence unfavourable to himself: *Lowell v. Todd*, 15 U. C. C. P. 306. Whenever it would be an offence to alter a deed which has been completed the legal presumption is that material alterations appearing on the face of the deed were made at such a time and under such circumstances as not to constitute an offence: *Alteration of deed.*

Advance-
ment of
child.

Death.

Graystock v. Barnhart, 26 A. R. 545:—Held, per Hagarty, C.J.O. (hæsitante), and Burton, J.A.—The presumption spoken of in s.-ss. 2 (a) and (b) of s. 2 of R. S. O. 1887, c. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Vict. c. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections. Per Maclellan, J.A.—The presumption is limited to cases of pressure, and as to that is irrebuttable. Per Osler, J.A.—The presumption is general and is irrebuttable, but the security in question in this action is supportable under the previous promise. *Cole v. Porteous*, 19 A. R. 111, distinguished. *Lawson v. McGeoch*, 20 A. R. 464. The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction; but the subsequent acts and declarations of a son can be used against him, and those claiming under him, by the father, where there is nothing shewing the intention of the father at the time of the transaction sufficient to counteract the effect of those declarations: *Birdsell v. Johnson*, 24 Chy. 202:—Held, that the word "signed" before the lessor's name raised no presumption that the lease was a copy, not the original: *Becher v. Woods*, 16 U. C. C. P. 29. When one to whom a devise *prima facie* beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept: *Re Defoe*, 2 O. R. 623. The presumption of death arising from continued absence of the demandant's husband, unheard of for seven years, is sufficient to sustain an action for dower as against the objection that he is still living: *Giles v. Morrow*, 1 O. R. 527.

Another class of presumptions includes those cases in which the jury will be directed by the Court to presume a fact of which no evidence has been given. Thus a bill of exchange is always presumed to be given for a good consideration: *Philliskirk v. Pluckwell*, 2 M. & S. 395. The law presumes in favour of possession: *Lee v. Johnstone*, L. R. 1 H. L. Sc. 426. So the law presumes that a party intended that which is the immediate or probable consequence of his act: *R. v. Dixon*, 3 M. & S. 15. In such cases in the absence of contrary proof the jury are, it should seem, as much bound to find agreeably to the legal presumption as they are to find according to the law as explained by the Judge.

A third class of presumptions is exclusively within the province of the jury, and they occur when direct proof of a fact is offered to the jury as probable evidence from which they may infer another fact. As where a witness says he lent a certain printed book to A. B., who afterwards returned to him a book exactly like it, which he believes to be the same but cannot swear to its identity, this is proof of identity, for it is more

probable that it was the same than another: *Pryer v. Gathercole*, 4 Exch. 262. If the sheriff's vendee verbally agree to accept payment of the redemption money for land sold for taxes personally, at a distance from the county town, in lieu of its being made to the treasurer for him, and the owner acts on this agreement, the other cannot afterwards to the owner's prejudice require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the Court holding that the presumption in a case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief: *Cameron v. Barnhart*, 14 Ch. 661. In favour of fair dealing.

Where an application is made to presume the death of an individual who has disappeared, the Court, on being satisfied that every reasonable means has been exhausted by advertisement and otherwise (without success) to ascertain his whereabouts, and on the evidence generally that there is every reason to believe that he is dead, will proceed to presume his death without regard to the amount of time which may have elapsed since his disappearance, though the lapse of time is often an important element in the enquiry: *Matthews, In the goods of*, 67 L. J. P. 11; (1898), P. 17; 77 L. T. 630. The Court will presume the death of a person after seven years although there be strong evidence to shew that the person has reason to keep his identity concealed: *Willis v. Palmer*, 53 W. R. 169. Though death will in a proper case be presumed, there is no presumption that a person died without issue. That is a matter to be proved, and there must be such evidence as would justify a jury in finding as a fact that there was no issue: *Jackson, In re, v. Ward*, 46 L. J. Ch. 553; (1907), 2 Ch. 354. Where the presumption of law that a person who has not been heard of for seven years is dead applies, the burden of proving that he was alive at a particular time within that period, so as to be entitled as legatee to a share or a testator's estate on surviving that testator, lies upon those claiming under him, and must be discharged by distinct and affirmative evidence: *Walker, In re*, 41 L. J. Ch. 219; L. R. 7 Ch. 120. applied: *Benjamin, In re; Neville v. Benjamin*, 71 L. J. Ch. 319; (1902), 1 Ch. 723; 86 L. T. 387. There is no presumption at law in favour of the existence of life, and when a person has not been heard of for seven years the burden of proving that he was alive at a particular date after that at which he was last heard of rests upon those who claim under him: *Phene's Trusts, In re*, 39 L. J. Ch. 139, followed: *Aldersey, In re; Gibson v. Hall*, 74 L. J. Ch. 548; (1905), 2 Ch. 181; 92 L. T. 826. The presumption of death.—There are cases where the fact of not being heard from for even longer than

seven years has not been considered sufficient: *Watson v. England*, 14 Sim. 27; *Bowden v. Henderson*, 2 Sm. & Giff. 360; *Prudential Assurance Co. v. Edmonds*, 2 App. Cas. 487. See *Somerville v. Aetna Life Insurance Co. of Hartford*, 1 O. W. N. at 854.

Liability
of bailee.

A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent. This applies to the hirer of a horse and carriage from a livery stable keeper: *Gremley v. Stubbs*, 39 N. B. R. 21; 6 E. L. R. 33. Semble, when all the partners of a firm which carries on its business under a descriptive name grant a bill, the presumption is that it is granted for the purposes of the firm, but the contrary may be proved: *Rossland Cycle Co. v. McUreadie* (1907), S. C. 1208.

Firm.

Husband
and wife.

Cohabitation of a husband and wife, each having property, and the fact that household necessities are, upon the order of the wife, supplied to and consumed at the common home, afford no evidence of a joint liability on the part of the husband and the wife for the price of such necessities: *Morel v. Westmoreland (Earl)*, 73 L. J. K. B. 93; (1904), A. C. 11; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38. When goods are ordered by a married woman living with her husband, for use in the household, the presumption of law is that the wife is acting as the agent of her husband, and such presumption is not displaced by the fact that the merchant kept the account in the name of the wife and rendered statements of it from time to time to her instead of to her husband: *Paquin v. Beauclerk* (1906), A. C. 160, distinguished: *Vopni v. Bell*, 8 W. L. R. 205; 17 Man. L. R. 417. *Prima facie*, goods in the actual possession of the wife of an execution debtor are the goods of the latter; a wife, in order to prove that the goods are her separate property, must shew facts that will displace the presumption involved in this rule: *Pink v. Perlman & Co.*, 40 N. S. R. 260.

Statute of
Limita-
tions.

The principle that the later items of an account draw the others after them, and thus save all from the Statute of Limitations, does not apply when quarterly payments (*e.g.*, for rent or tuition) are made and received as for a late specific and independent quarter due at the time of payment, unmixed with items for any earlier quarter. The presumption in such a case is, unless the contrary be shewn to be the fact, that the earlier quarters have been all paid and satisfied: *King's College v. McDougall*, 5 U. C. R. 315. If a merchant receive an invoice and retain it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon: *Kearney v. Letellier*, 27 S. C. R. 1.

Retaining
invoice.

There is a species of presumption not uncommonly urged in the addresses of a counsel to a jury, viz., the presumption that the testimony of a witness who might be but is not called, is unfavourable to the party who omits to call him. So it is sometimes treated as a legitimate inference that a document tendered in evidence by A., and objected to by B., is unfavourable to the case of B. Thus where a document was offered in evidence to confirm the statement of a witness, but was rejected by the Judge, it was held to be no misdirection for the Judge to tell the jury that the document might be assumed against the objecting party to be one which confirmed the testimony of the witness: *Sutton v. Davenport*, 27 L. J. C. P. 54. Such presumptions are of no value as evidence *per se*, and are not worth much except under special circumstances. If the witness not called is present at the trial, he may be called by the opposite party. If not present his absence may be due to other causes than that of wilful suppression. Where the document is excluded by the ruling of the Judge, it is because the law presumes that the ends of justice will not be advanced by the reading of it, and it seems a strong thing for the Court to invite inferences against the objecting party, though counsel cannot be restrained from addressing any, however fallacious, arguments to the jury. But generally there is a fair presumption against a party who keeps back a document in his own possession: *Atty.-Gen. v. Windsor, Dean of*, 24 Beav. 679. Evidence of the most conclusive character must be adduced in order to have a deed absolute in character declared to operate as a mortgage only: *McMicken v. Ontario Bank*, 20 S. C. R. 548. The fact that a deed after it had been signed and sealed by the grantor is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument. The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately, the grantor retained the possession and enjoyment of it until his death: *Zwicker v. Zwicker*, 29 S. C. R. 527.

Not calling witness.

Exclusion of document.

Cutting down deed

Delivery of deed.

A grant of land bounded by the bank of a navigable river or an international waterway, does not extend *ad medium filum* as in the case of a non-navigable river. If in a conveyance of land the description is not certain enough to identify the locus, it is to be construed according to the language of the instrument, though it may result in the grantor assuming to convey more than his title warranted. The intention of the parties to a deed is paramount and must govern regardless of consequences. *Res magis valet quam pereat* is only a rule to aid in arriving at the intention, and does not authorize the Court to override it. A general description of land as being part

Grant of land: description.

- of a specified lot must give way to a particular description by boundaries, and if necessary the general description will be rejected as *falsa demonstratio*. Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence, the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either party. Where a description is such that the point of commencement cannot be ascertained it cannot be determined at the election of the grantee; *Barthel v. Scotton*, 24 S. C. R. 367.
- Confidential relations. The principle that where confidential relations exist between donor and donee, the gift is on grounds of public policy presumed to be the effect of those relations, which presumption can only be rebutted by shewing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus in case of a gift to the donor's son for benefit of the latter's children, when said son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor nine years before his death had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later, and by voluntarily paying it before he died, such presumption does not arise:
- Indemnification of mortgagor. *Trusts and Guarantee Co. v. Hart*, 32 S. C. R. 553. Where a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. This right where it exists arises from implied contract: *Warring v. Ward*, 7 Ves. 332, explained: *Beatty v. Fitzsimons*, 23 O. R. 245. That
- Ownership of land. the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway: *O'Connor v. Nova Scotia Telephone Co.*, 22 S. C. R. 276. Where such motives exist in the
- Solicitor's knowledge. mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice: *Cameron v. Hutchinson*, 16 Chy. 526. There is ordinarily no presumption of undue influence in the case of a gift from a father to a son, unless it is proved that the son occupied at the time a relation of confidence and influence; but if that is proved the gift may need for its support the same evidence as a gift to any other person occupying such relation: *McConnell v. McConnell*, 15 Chy. 20. In order to establish the
- Highway. existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway, but also that the public ac-

cepted such dedication by user thereof as a public highway: *Moore v. Woodstock Woollen Mills Co.*, 29 S. C. R. 627. Where the man-aging owner and the master of a ship orders necessaries for the navigation of the ship on credit, the owners are liable. The certificate of registry is presumptive evidence of the ownership. 4th ser. R. S. c. 96, s. 31; *Smith v. Fulton et al.*, 2 R. & C. 225 (N.S.). To sus-tain a plea of right of way by lost deed, no proof is requisite of such deed having actually existed, but the jury have a right to presume such deed from an uninterrupted usage of a way exercised as a matter of right and necessary to the convenient enjoyment of the land to and from which the road leads: *Jones v. Jones*, 2 Kerr. 265 (N.B.). Where a party has it in his own power to give evidence of a particular fact, and does not give the best evidence within his reach, the presumption ought to be against him: *Briggs v. McBride*, 1 P. & B. 663 (N.B.). The admission on the record that parties are alive precludes the presumption of their death arising from continued absence: *Doane v. McKenny*, James, 328 (N.S.). Where two or more persons, and especially where relatives perish in the same calamity, the law recognizes no presumption of survivorship; but in the total absence of all evidence respecting the particular circumstances of the calamity, the matter will be treated as if all of them had perished at the same moment, and consequently none of the parties will be held to have transmitted any rights to the other: *Hartshorn et al. v. Wilkins et al.*, 2 Old. 276 (N.S.).

Necessaries

Right of way.

Admission that party alive.

Survivorship.

Where a husband and wife were murdered in a massacre in China on July 9th, 1900, the Court (following *Wainwright, In the goods of*, 28 L. J. P. & M. 2; 1 Sw. & Tr. 258), gave leave to presume the deaths on or since the above date, and also to swear that there was no reason to believe that either husband or wife survived each other: *Beynon, In the goods of*, 70 L. J. P. 31; (1901), P. 141; 84 L. T. 271; 65 J. P. 246.

When a ship founders at sea without anyone knowing the cause, there is a presumption that the disaster is a result of its unseaworthy state. Where the owner sets up accident or *vis major* he is bound to prove it: *Grenier v. Connolly*, 42 S. C. R. 242; Q. R. 34 S. C. 405.

Unseaworthiness.

HEARSAY.

It is a general rule of evidence that declarations of persons not made upon oath are inadmissible evidence of the fact declared: *Spargo v. Brown*, 9 B. & C. 938; **unless it be by way of admission by a party to the suit.** Therefore, hearsay evidence, which is the mere repetition of such declarations, upon

the oath of a witness who heard them, is excluded. There are, however, certain classes of cases in which hearsay is on various grounds admissible.

Pedigree.

In questions of pedigree the oral or written declarations of deceased members of the family are admissible to prove a pedigree. And this exception is founded on the obvious difficulty of tracing descent and the relationship of deceased members of families by any other evidence. Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property. In proving recent events, such as the place of birth, age, death, etc., of a person, where that fact is strictly in issue, stricter proof may be reasonably required. The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely from their domestic habits and connections that they are speaking the truth and are not mistaken: *Whitelocke v. Baker*, 13 Ves. 514. The relative whose declarations are offered must be proved to be dead before they can be admitted in evidence: *Butler v. Mountgarret, Vt.*, 7 H. L. C. 633. Unless his death may be presumed. If the declarations were made after a controversy has arisen with regard to the point in question, they are inadmissible: *Berkeley Peerage*, 4 Camp. 401. The declaration may be admissible though made from interested motives, and in order to prevent future controversy: *S. C.*, Id. 418. To displace title made under a near relative capable of inheriting, it should be shewn that there is some one in existence representing the alleged elder branch of the family: *Park v. Henderson*, 7 U. C. R. 182. Before a stranger can give evidence of declarations as to the pedigree made by a relation of the family, there must be shewn: 1. The death of that relation; and 2. The fact of his relationship to the family, which fact cannot be proved by his own assertion: *Dunlop v. Servos*, 5 U. C. R. 284. Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree: *Walker v. Murray*, 5 O. R. 638. The declarations of a deceased testator respecting his age at the execution of his will are not admissible: *Stephen v. Ford*, 3 U. C. R. 352.

Public or general interest.

Another exception to the rule which excludes hearsay evidence is where the question relates to matters of public or general interest. The term "interest" here means pecuniary interest or some interest by which the legal rights or liabilities of a class of the community are affected; and the grounds of admissibility are: Because the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof; because in local matters all persons living in the neighbourhood and interested in them are likely to be conversant with them; because, common rights are

naturally the subject of common and public conversation, in the course of which statements are made which uncontradicted are likely to be true; and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other and interested in investigating the truth: *R. v. Bedfordshire*, 4 E. & B. 541-2. The rule with regard to the practice from whom the declarations proceed has been thus laid down: In cases of rights or customs which are not strictly speaking public, but are of a general nature, and concern a multitude of persons (as in questions with respect to boundaries and customs of particular districts), it seems that hearsay evidence is not admissible unless it be derived from persons conversant with the neighbourhood. On the other hand, actual inhabitancy in the place the boundaries of which are in dispute is unnecessary. But where the right is strictly public (a claim of highway for instance), in which all the King's subjects are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood or frequently using the road in dispute: *Crease v. Barrett*, 1 C. M. & R. 919. Such declarations, as in questions of pedigree, must not have been made *post litem motam*: *R. v. Cotton*, 3 Camp. 444. The declarations of old persons still alive cannot be admitted as proof of reputation: *Woolway v. Rowe*, 1 A. & E. 117. The locality and extent of a square being in question:—Semble, that this being a matter of a quasi public nature, in which a class of the people in the neighbourhood would be concerned, evidence of reputation was admissible: *Vankoughnet v. Denison*, 11 A. R. 699. The declaration of a person as to the boundaries of land is not evidence unless it is made while he is in possession of the land and is against his interest, or unless there is privity between him and the person against whom his declaration is offered: *Sartell v. Scott*, 6 All. 166 (N. B.).

Declarations respecting the boundaries of land by a person in possession and under whom the defendant claims are evidence against him in an action in which the boundaries of the same land are in dispute: *Niles v. Burke*, 1 Fug. 237.

When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question and explanatory of it, it is admissible. Words and declarations are admissible when they accompany some act the nature, object or motives of which are the subject of the enquiry: *Hyde v. Palmer*, 3 B. & S. 657. In the case of an equivocal act, the accompanying declarations are often absolutely necessary to show the animus of the actor. Thus a payment

Fact part
of transac-
tion.

by a debtor may be explained by an accompanying request to apply it to a certain debt.

Evidence
of feelings.

Declarations are admissible as evidence of feelings or of suffering; thus in an action of assault on plaintiff's wife, evidence of what she said immediately on receiving the hurt is admissible for him: *Thompson v. Trevanion*, Skin. 402. It is not every declaration that is receivable in evidence merely because it accompanies an act done by the speaker. The admissibility of the declaration depends not merely on its accompanying an act, but on the light which it throws upon an act which is in itself relevant and admissible evidence: *Wright v. Tatham*, 7 Ad. & E. 313.

As a claim.

A declaration is sometimes receivable per se as a claim. Thus where the plaintiff asserts a right to goods under a sale to him by C, and the defence is that the alleged sale was collusive, defendant's witness may be asked "whether he had not heard C claim the goods after the sale?" Under such circumstances a claim is as much an act done as if C had taken the goods saying they were his: *Ford v. Elliott*, 4 Exch. 78. In many of these cases the declarations are not strictly instances of hearsay (i.e., second-hand) evidence, though commonly so classed. The *res gesta* in each case is original evidence; and the accompanying declaration being part of it is also original. When a surveyor stated that he measured certain distances from a post pointed out to him by B, and ran his course from that and tested his line from four points given him by B, and found it correct, the evidence was improperly received: *The Queen v. Budge*, vol. 20, 531 (N. B.).

Docu-
ments as-
serting a
right.

Under the head of hearsay are usually classed those cases in which expired leases, grants, or other documents of a similar kind actively asserting a right on the part of the maker, have been admitted as evidence of that right in favour of persons claiming under him; they are in fact acts of ownership, and as such evidence of property. Generally what any one writes or says in his own favour cannot be evidence for himself or his representative: *Glyn v. Bank of England*, 2 Ves. Sen. 43. Therefore entries made by a deceased person under whom the defendant claims acknowledging the receipt of his rent for the premises in question, are not admissible for the defendant in proof of his title to them: *Outram v. Morewood*, 5 T. R. 121. Mere declarations of right coupled with no other act or actual exercise of it, proved or presumable, are inadmissible as evidence in favour of the right asserted, except as against those who claim under the declarant. The mere absence of interest will not make the declaration of a deceased party evidence: *Berkeley Peerage Case*, 11 Cl. & Fin. 109. In which case declarations made by deceased clergymen were rejected as evidence of marriage. On a somewhat similar principle the declarations of the testator as to his intentions are admissible to support his will if disputed on the ground of

fraud, circumvention or forgery: *Ellis v. Hardy*, 1 M. & Rob. 525. So they are admissible to impeach the will by proving such fraud: *Small v. Allen*, 8 T. R. 147. So, such declarations by a testator made before the execution of his will are admissible to prove that alterations to the will or any incorporated document were made prior to execution: *In re Sykes*, L. R. 3 P. & M. 26. But declarations made after execution cannot be so used: *Dench v. Dench*, 2 P. D. 60. In the case of a lost will declarations by a testator as to its existence and contents, whether made before or after execution, are admissible: *Sugden v. St. Leonards*, L. R. 1 P. D. 154, C. A. So such declarations are admissible to show what papers constitute a will: *Gould v. Lakes*, 6 P. D. 1.

In a variety of cases the declarations of deceased persons (not parties) made against their own interest have been admitted: *Barker v. Ray*, 2 Russ. 67n; and they are admissible as evidence of all the facts therein stated, though some of them may not have been within the parties' own knowledge: for the whole declaration must be taken together: *Crease v. Barrett*, 1 C. M. & R. 919. An interest arising from the liability of the party to a prosecution if his statement was true is not such an interest as will make his declarations evidence; and for this reason the statement of a clergyman that he had celebrated an irregular marriage was held not to be evidence of the marriage: *Sussex Peerage*, 11 Cl. & Fin. 85. A declaration by the deceased occupier of the land that he rents it under a certain person, is evidence of that person's *seisin*: *Peaceable v. Watson*, 4 Taunt. 16. The principle is that occupation being presumptive evidence of a *seisin* in fee, any declaration claiming a less estate is against the party's presumed proprietary interest: *Crease v. Barrett*, 1 C. M. & R. 931. Entries against interest: *Turner v. Dewar*, 41 U. C. R. 361. Repair books of company containing statements of repairs required, admitted without calling the persons by whom the entries were made: *Canada Atlantic v. Morley*, 15 S. C. R. 145. A claim by the next of kin of a deceased legatee cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books, giving credit to such next of kin for portions of such deceased legatee's share, such entries were held to be evidence of the relationship of debtor and creditor between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness; *Re Kirkpatrick v. Stevenson*, 10 P. R. 4. An oral declaration is as admissible as a written one: *Bewley v. Atkinson*, 13 Ch. 283, C. A. Generally the question of admitting statements against interest made by deceased persons occurs where the suit is *inter alios* and the declarant is a stranger to it. But where the plaintiff sued as executor of the payee of a note, he was allowed to rebut the Statute of Limita-

Entry
made in
course of
duty.

tion by proof of a written acknowledgment made in a book by the testator of payment of interest on the note by defendant within six years: *Bradley v. James*, 13 C. B. 822. The declarations against interest of persons who at the time of making them stood in the same situation and interest as the party to the suit, are evidence against that party; thus a declaration of the former owner of plaintiff's land that he had not the right claimed by plaintiff in respect to it, is admissible: *Woolway v. Rowe*, 1 Ad. & E. 114. Where an entry or declaration is made by a disinterested person in the course of discharging a professional or official duty, it is in general admissible after the death of a party making it. Thus, a notice endorsed or served by a deceased clerk in a solicitor's office, whose duty it was to serve notices, is evidence of service: *Patteshall v. Turford*, 3 B. & Ad. 890. Upon the same principle contemporaneous entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery: *Price v. Torrington, Ltd.*, 1 Salk. 285. In order to render such entries evidence it must appear that the shopman is dead; that he is abroad and not likely to return is not sufficient: *Cooper v. Marsden*, 1 Esp. 1. The entry must be by the person who actually did the act recorded by it: *Polini v. Gray* 12 Ch. D. 411 C. A. Entries made by deceased persons in the course of their business or in discharge of their duty are admissible only where it is the duty of the deceased both to do the act and to make an entry or record of having done it: *Massey v. Allen*, 13 Ch. D. 558. Though a contemporaneous entry made in the course of office reporting facts necessary to the performance of a duty may be admissible, yet the statement in it of other extraneous circumstances, however actually they may find the place in the narrative, is not proof of these circumstances: *Chambers v. Bernasconi*, 1 C. M. & R. 347. Declarations against interest are declarations of all the facts stated whensoever made; declarations made in the course of office or business are evidence only of the facts which it was the business of the officer or writer to state, and they must generally be contemporaneous with the act done: *Smith v. Blakey*, L. R. 2 Q. B. 326. Written statements by a deceased person are not admissible as made in the course of duty of the deceased person to do the particular thing and to record the fact of having done it contemporaneously: *Rowe v. Brenton*, 8 B. & C. 737, and *Newcastle (Duke) v. Broxtowe Hundred*, 2 L. J. M. C. 47, 4 B. & Ad. 273, distinguished; *Mercer v. Deene*, 74 L. J. Ch. 71, (1904) 2 Ch. 534, 91 L. T. 513, 68 J. P. 479. In an action to have a deed given by one defendant to another defendant declared a mortgage, evidence was offered of a declaration made by the grantor two years after the deed had been given and recorded to the effect that the deed was in reality only a mortgage to secure the repayment of \$200:—Held, that this declaration could not operate to affect the rights of the grantee or derogate

Distinction
between de-
clarations.

from the conveyance to him: *Kavanagh v. Slavin*, 40 N. S. R. 150n, followed; *Linton v. Sutherland*, 40 N. S. R. 149. A statement by a person, through whom a plaintiff claims, made to a stranger, not in the presence of the plaintiff, and before the transfer to the plaintiff, that he, the predecessor in title, was not the owner of the property in question, is evidence as a declaration against interest and its rejection is ground for a new trial: *Lloyd v. Adams*, 37 N. B. R. 590. The declarations of one in adverse possession made on the premises while in occupation, importing a claim of a statutory title in himself, are admissible in an action of ejectment against his representatives to support the presumption of title from possession, whether they are against interest or not and whether made before or after the statutory title accrued: *Rundle v. McNeil*, 38 N. B. R. 406, 4 E. L. R. 522.

RECEIPTS.

At common law the acknowledgment in a deed of the receipt of money was conclusive evidence as between the parties to it of such receipt: *Baker v. Doney*, 1 L. & C. 704. But in the case of deeds, R. S. O. 1897, c. 119, s. 5, now provides that "a receipt for consideration money, or securities contained in the body of a conveyance, shall be a sufficient discharge to the person paying or delivering the same without any further receipt being indorsed on the conveyance, and shall in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." In general a receipt not under seal is only a *prima facie* acknowledgment that the money has been paid, and therefore may be contradicted or explained: *Graves v. Key*, 3 B. & Ad. 318; even though expressed to be "in full of all demands:" *Bowes v. Foster*, 2 H. & N. 779. Receipt in deed sufficient.

EXPERT TESTIMONY.

Expert evidence is an opinion by a qualified person on facts already proved, involving scientific or technical knowledge, and is not evidence of things done or measurements taken which any one is competent to prove, the weight to be given to his evidence depending upon his ability: *Cain v. Uhlman*, 20 N. S. R. (S R. & G.) 148; S C. L. T. 373 (N. S.).

It is not as a general thing the best rule in cases of varying Evidence opinion as to value, to reject one set of witnesses in toto and to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed and that truth lies somewhere as to value.

- Delegation of judicial functions.** between the extremes: *Munsie v. Lindsay*, 11 O. R. 520. An action for damages caused by collision between two vessels was tried without a jury, and after the evidence had been taken the trial Judge, with the consent of both parties, consulted two master mariners and adopted as his own their opinion based on a consideration of conflicting testimony as to the responsibility for the collision: Held, that this was a delegation of the judicial functions; and a new trial was ordered. The scope of Con. Rule 207, as to calling in the assistance of experts, considered: *Wright v. Collier*, 19 A. R. 298; 24 S. C. R. 714. In an action on a promissory note against the maker, the defendant swore that the signature was not his, but an expert comparing it with admitted signatures said that it was written by the same person: Held, no ground for a new trial that the jury had not been directed that the evidence of experts was entitled to little weight when contradicted by direct testimony; and the learned Judge below having been satisfied with the verdict the Court would not interfere: *Luce v. Coyne*, 36 U. C. R. 305. It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question, and then to read such books to the jury; but they may be asked whether such books have influenced their opinion: *Brown v. Sheppard*, 13 U. C. R. 178.
- Medical witnesses.**

A physician may strengthen his memory by referring to works which he considers of authority; and counsel may read extracts therefrom to him and obtain his judgment thereon. An illustration is for this purpose as much a part of the book as the text, and it may when thus referred to be shown to the jury: *Brownell v. Black*, 31 N. S. R. 594.

- Draughtsmen.** The evidence of professional draughtsmen was in this case held to have been properly admitted to shew what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plans were intended to indicate: *Attrill v. Platt*, 10 S. C. R. 425. As a rule the Courts discountenance professional or *quasi* expert evidence from being brought before them in writing: *Attorney-General v. Gooderham*, 10 P. R. 259. Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra judicial statements and municipal reports: *Crawford v. City of Montreal*, 30 S. C. R. 406.
- Weight of evidence.**

By section 10 of the Evidence Act of Ontario, it is provided as follows:

- Limit of number of expert witnesses in action, etc.** 10. Where it is intended by any party to examine as witnesses persons entitled according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses.

ADMISSIONS.

Admissions by a party to the record out of Court are evidence, and primary evidence of the fact so admitted.

But though the express admissions of a party to the suit, or admissions implied from his conduct, are evidence against him, he is at liberty to prove that such admissions were mistaken or untrue except in the case of estoppel: *Heane v. Rogers*, 9 B & C. 586; but it does not matter whether the mistake arose from misapprehension of law or fact. Such a mistaken impression, however, will not exclude the admission, though it will impair its weight as evidence: *Newton v. Belcher*, 9 Q. B. 612.

How far admissions conclusive.

The Consolidated Rules of Practice (Ontario) provide:

527. A party may be called upon by any other party to admit any document saving all just exceptions by a notice to admit, which may be according to Form No. 63.

Notice to admit documents.

528. It shall be sufficient if written admissions are signed by the solicitor of the party by whom or on whose behalf they purport to be made.

Admissions sufficiently signed by solicitor.

When a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue; therefore it was in this case competent for C., a co-defendant, to deny the execution of the bond, his pleading not expressly admitting it: *Waterloo Mutual Ins. Co. v. Robinson*, 4 O. R. 295. The plaintiffs sought to support their case by reference to a certain statement in the defendant's pleading, in which besides denying their right to recover she herself also claimed title under a deed from the executors of S.:—Held, that they could not take that part of the pleadings which suited their purpose and reject the rest; they could not use a scrap of it to eke out the insufficiency of their own evidence: *Barber v. McKay*, 17 O. R. 562. At a former trial a copy of an agreement between the parties was admitted in place of the original:—Held, that the admission so made was good for the subsequent trial: *McDonald v. Murray*, 5 O. R. 559.

The examination of a party to an action taken for the purpose of discovery may be used at the trial to contradict the same party, but cannot be put in evidence as an admission: *Arnold v. Caldwell*, 1 M. L. R. 81, 155 (Man.).

Admissions may sometimes be presumed from the silence or conduct of a party when certain statements are made. Silence.
On this ground it is that the uncontradicted statements of any one made in the presence and hearing of a party against whom they are offered are evidence: *Bessala v. Stern*, 2 C. P. 265, C. A. But no inference against him can be reasonably drawn if the fact stated before

him be one which is plainly not within his own knowledge, for he may be unable either to admit or contradict it. Although silence has been considered to be evidence of assent to a statement made orally in the presence of a party, no such inference can be fairly drawn from the mere omission of a party to reply to a letter: *Richards v. Gellatly*, L. R. 7 C. P. 131; unless sent under circumstances which entitle the writer to an answer: *Richardson v. Dunn*, 2 Q. B. 218; see *Lucy v. Mouflet*, 5 H. & N. 229. **The plaintiff's title to sue, or the character in which the plaintiff sues, or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party**, and in some cases the admission, though not strictly an estoppel, is conclusive. Thus, in the case of a libel on the plaintiff as envoy of a foreign state: *Yrisarri v. Clement*, 3 Bing. 432. **Mere subscription of a paper as a witness is not in itself proof of knowledge of its contents:** *Harding v. Crethorn*, 1 Esp. 58. An admission is evidence whether made by a trustee or nominal party who sues for the benefit of another: *Gibson v. Winter*, 5 B. & Ad. 96. But the statement of a *cestui que trust* is either wholly inadmissible against his trustee, or admissible only as to his own interests, where the trustee holds in trust not for him only, but for others: *Rowlandson v. Wainwright*, 8 Ad. & E. 691. It is no objection to the proof of an admission that it was made under compulsory process, but the compulsion must not be illegal: *R. v. Garbett*, 1 Den. C. C. 236. Such compulsory admission is no evidence of an account stated: *Tucker v. Barrow*, 7 B. & C. 623. **Though the contents of a written instrument cannot in general be proved by a witness without production of it, yet what a party to the record says is primary evidence against himself as an admission, though it relates to the contents of a written instrument, and though the contents be directly in issue in the cause:** *Slatterie v. Pooley*, 6 M. & W. 664. There can be no doubt, however, that such an admission ought in some cases to have no weight; as where the party relying upon it is manifestly withholding more satisfactory evidence in his own power; or where the admission assumes a degree of knowledge, whether of law or of fact, which the party admitting is not likely to possess; as, the construction of a deed of settlement. A former suit had been instituted by the plaintiff, which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed:—Held, that under such circumstances the question was not *res judicata*, and that the evidence taken in the former suit, and the examination of defendant by the plaintiff therein, were admissible in the present one, the issue being practically the same: *Adamson v. Adamson*, 28 Chy. 221.

Admissions made with a view to compromise and in order "to buy peace" are not evidence against the maker:

B. N. P., 236. An offer of a specific sum by way of compromise is Compro-
evidence unless accompanied with a caution that the offer is confiden- mise.
tial or without prejudice: *Wallace v. Small*, M. & M. 446. Generally
neither letters written "without prejudice," nor replies to such letters, Without
though not similarly guided, can be used as evidence: *Hoghton v. prejudice.*
Hoghton, 15 Beav. 278. So when a correspondence is begun with a
letter written "without prejudice," that covers the whole correspond-
ence: *Ex p. Harris*, 44 L. J. Bky. 33. Although a letter written
"without prejudice" by a party in the course of a cause cannot
be read against him, it may be read by him on the question of costs,
in order to shew that he had made such an offer as rendered the
further prosecution of the suit unnecessary: *Boyd v. Simpson*, 26 Chy.
278. All communications expressed to be written without prejudice,
and fairly made for the purpose of expressing the writer's views on
the matter of litigation or dispute, as well as overtures for settle-
ment or compromise, which are not made with some other object in
view and wrong motives, are not admissible in evidence. Where,
therefore, a letter written without prejudice and coming within the
above rule was admitted at the trial, the Court not being able to
say that defendant was not prejudiced thereby, a new trial was
directed: *Pirie v. Wyld*, 11 O. R. 422. A letter containing an offer
written "without prejudice" means "I make you an offer; if you do
not accept it this letter is not to be used against me," but when the
offer is accepted the privilege is removed: *Omnium Securities Co. v.*
Richardson, 7 O. R. 182.

A letter written "without prejudice" admitted, where written
not with a view to settlement, but in repudiation of the purchase:
Casser v. Simpson, 13 O. W. R. 285. The admissions of a guardian are Guardian.
not evidence against an infant who sues by his guardian: *Cowling*
v. Ely, 2 Stark. 366; nor the admissions of a *prochein amy*: *Webb v.*
Smith, Ry. & M. 106. Where a party to the suit directly or impliedly Agent.
constitutes a third person his agent for the purpose of an admission,
the admission so made is evidence: *Lloyd v. Willan*, 1 Esp. 178. With
regard to the **admissions of agents in general** the rule is this:
When it is proved that A is agent of B, whatever A does or says or
writes in the making of a contract as agent of B is admissible in
evidence against B, because it is part of the contract which he makes
for B, and which therefore binds B; but it is not admissible merely
as the agent's account of what has passed: *Langhorn v. Allnutt*, 4
Taunt. 519. Thus the declaration of a servant employed to sell a
horse is evidence to charge the master with a warranty, if made at
the time of sale; but statements made at any other time are not
admissible against him: *Helyear v. Hawke*, 5 Esp. 72. An admission
by a servant in a transaction not relating to the business in which he
is employed is not evidence against his master: *Garth v. Howard*, 8

Bing. 451. The letters of an agent to his principal, containing a narrative of past transactions in which he had been employed, are not admissible in evidence against the principal: *Kahl v. Jansen*, 4 Taunt. 565.

Principal
and surety.

In an action against a surety the admissions or declarations of the principal to whom goods have been sent by the plaintiff at the defendant's request are not evidence against the defendant either as to the receipt of the goods or as to other facts respecting them: *Evans v. Beattie*, 5 Esp. 26. In an action against principal and sureties as co-obligors on a collector's bond: Held, that the admissions of the principal were clearly evidence against himself; and it might be strongly argued that whatever is evidence against the principal will also be receivable against his co-defendant in an action on their joint obligation: *Municipal Council of Easthope v. Helmer*, 7 U. C. C. P. 506. Held, that the books of the agent or clerk of a public company during his lifetime are not good evidence against his surety, when sued on his bond for a deficiency in the agent's accounts: *Ferrie v. Jones*, 8 U. C. R. 192. A principal is not bound by the statements of his agent after the happening of the act sued upon, unless the agent has authority to make such statements: *Down v. Lee*, 4 M. L. R. 177 (Man.). Presumption as to cause of injury on railway: see *McMillan v. Manitoba and North-western Ry. Co.*, 4 Man. Rep. 220 (Man.). Evidence may be given **against**

Companies

companies of admissions made by their directors or agents relating to matters that are in the scope of their authority: *National Exchange Company of Glasgow v. Drew*, 2 Macq. 103. **Before the admissions of an agent can be received the fact of his agency must be proved.** This can be done by proving that the agent has acquired credit by acting in that capacity and that he has been recognized by the principal in other instances of a similar character to that in question: *Watkins v. Vince*, 2 Stark. 328. After *prima facie* evidence of

Partners.

partnership the declaration of one partner is evidence against his co-partner as to partnership business: *Nicolls v. Dowling*, 1 Stark. 81; though the former is no party to the suit. It is evidence though made after the dissolution of partnership, if made as to a transaction which took place before the dissolution: *Wood v. Braddick*, 1 Taunt. 104. In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability without producing the partnership deed: *Lee v. MacDonald*, 6 O. S. 130. The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership, binds all the partners unless they seek by an examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to: *Taylor v. Cook*, 11 P. R. 60. The admission of a husband as to the boundaries of land held by him in right of his

wife are not binding upon his wife after his decease. *Des Barres, J.*, dissenting: *Dill v. Wilkins*, James 113 (N. S.). An admission of the Mortgage. execution of the mortgage was held clearly to include the signature to the receipt, and the receipt of the money as there stated: *McDonald v. Clark*, 30 U. C. R. 307. Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt so that the mortgagee or his assigns can maintain an action for its recovery: *London Loan Company v. Smyth*, 32 U. C. C. P. 530. Any admission of boundary to be binding must be made with a full knowledge of the facts, and this knowledge is a question for the jury: *Dill v. Wilkins*, James, 113 (N. S.). **Admissions by co-trespassers** Co-tort-
feasors. or **joint-defendants in actions for tort**, are not generally evidence, except against themselves, unless there be proof of common motive and object and the declarations relate to them: *Daniels v. Potter*, M. & M. 501. Nor are they evidence in actions *ex contractu* unless they relate to a matter in which there is an identity of interest: *Fox v. Waters*, 12 Ad. & E. 43. In general the admissions of a **wife** will not affect the husband. Thus, the wife's receipt for money or admission of a trespass is not evidence against the husband: *Hall v. Hill*, 2 Star. 1094; *Dean v. White*, 7 T. R. 112. But where the Husband wife can be considered the agent of her husband, her admissions may and wife. be received as evidence against him: *Emerson v. Blonden*, 1 Esp. 142. Her admissions under such circumstances will take a case out of the Statute of Limitations: *Paletthorp v. Furnish*, 2 Esp. 511. In the case of a wife sued with her husband in respect to her separate estate, it would seem that her admissions, though not those of her husband, would be evidence against her. When the **counsel** in a cause so Counsel. conducts it as to lead to an inference that a certain fact is admitted by him, the jury may take it as proved: *Stacey v. Blake*, 1 M. & W. 168. Plaintiff is not bound by the inadvertent statement or admission of his counsel in opening his case, such statement being promptly retracted: *Jannette v. Great Western R. W. Co.*, 4 U. C. C. P. 488. Defendant may avail himself of a fact which is admitted by the plaintiff in his opening, and made part of the plaintiff's case, although as the pleadings stood the defendant could not have given evidence of such fact: *Wallace v. Vernon*, 1 Kerr. 5 (N. B.). An admission made Solicitor. by the **solicitor** of one of the parties to prevent the necessity of proving a fact on the trial, is sufficient evidence of that fact: *Young v. Wright*, 1 Camp. 141. Admissions made by the defendant's solicitor when making proposals on behalf of his client respecting the plaintiff's demand (the solicitor refusing to be examined), are evidence against the defendant; and proof that they were made by the solicitor on the record will be sufficient to establish his agency: *Gainsford v. Grammar*, 2 Camp. 9. An agreement by the solicitor "to admit on the trial of

this cause " may be used on a new trial: *Elton v. Larkins*, 1 M. & Rob. 196; even though the solicitor retracts it before the new trial: *Wetherell v. Bird*, 7 C. & P. 6.

Account
rendered.

The whole of an admission must be taken together; therefore, where an account rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account: *Thomson v. Austen*, 2 D. & Ry. 361. But the jury are not bound to believe both sides of the account, therefore where the plaintiff put in evidence an account rendered by the defendant in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter-claim and to recover the amount

Conversa-
tion.

admitted: *Rose v. Savory*, 2 N. C. 145. The assertion of a party in a conversation given in evidence against him of facts in his favour is evidence for him of those facts: *Smith v. Blandy*, Ry. & M. 257. But a party cannot examine a witness who is called to prove the conversation against him as to unconnected statements made by him (the party) on the same occasion, containing distinct assertions of his own rights. In an action for not delivering the proper quality of oil

Account.

agreed for: Held, that defendant's account rendered to the plaintiffs after the delivery for 6,000 gallons of rock oil was clearly evidence as an admission by them of what it was they professed to sell: *Edgar v. Canada Oil Co.*, 23 U. C. R. 333. The rendering of an account by the plaintiffs' attorney in this Province (the plaintiffs residing abroad) is not binding finally on the plaintiffs as to the mode of calculation; and even the plaintiffs themselves incorrectly stating an account may have it legally adjusted at any time before a final settlement: *McGregor v. Gaulin*, 4 U. C. R. 378. The acknowledgment of the correctness of a bank account at the end of a month was held to be at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties: *Agriculture Investment Co. v. Federal Bank*, 6 A. R. 192.

ESTOPPEL.

A recital in a deed is evidence against him who executed the deed or any person claiming under him: Com. Dig. Evid. (B. 5); and such recital operates as an estoppel in an action founded on the deed: *Carpenter v. Buller*, 8 M. & W. 212; unless the parties in their pleading voluntarily waive it, and instead of replying the estoppel submit the fact recited to the jury: *Young v. Raincock*, 7 C. B. 310; but in order to create an estoppel the deed must contain a precise statement of the fact relied on, *e.g.*, in a grant of land by A that A was seized of the legal estate, a covenant that the grantor had power to grant is insufficient: *Gen. Finance v. Liberator*, 10 Ch. D. 15.

The recitals in a deed may confine the effect of admissions in the same instrument: *Lampson v. Corke*, 5 B. & A. 607.

Quære, whether at the present time an educated man to whom such a misrepresentation as to the nature of a deed has been made as would support a plea of *non est factum* may not be estopped from availing himself of that plea against a person who innocently acts on the faith of the deed being valid: *Howatson v. Webb*, 77 L. J. Ch. 32, C. A. Affirming (1907) 1 Ch. 537.

Where the recital in a deed is used as an admission, it must be proved strictly, although cancelled: *Breton v. Cope*, Peake 44, and a recited instrument is only admitted for so much as is recited. If any other part of it is to be proved, it must be produced and proved in the usual way: *Gillett v. Abbott*, 7 Ad. & E. 783. Recital.

A statement to operate as an estoppel must be clear and unambiguous. The doctrine of estoppel as applicable to innocent misrepresentations discussed and explained: *Low v. Bouverie*, C. A. (1891), 3 Ch. 82.

The principle that nobody has any right to represent his goods as the goods of somebody else (*Redway v. Banham* (1886), A. C. 199, 204), has no limit as regards name of origin of manufacture or sale or otherwise: *Saxlehner v. Appolinaris Co.* (1897) 1 Ch. 893.

Fraud is necessary to the existence of an estoppel by conduct. Estoppel by conduct.
The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been plain and made with the knowledge of the facts, and not a matter of mere inference or opinion; and certainty is essential to all estoppels: *McGee v. Keene*, 14 O. R. 226.

A recital is not necessarily an estoppel to both parties unless the mutuality appears. If it is the statement of one party only it estops only that party: *Stroughill v. Buck*, 14 Q. B. 787.

There is a class of cases in which a party may be estopped or precluded by his wilful misstatement in pais, from disputing a state of things upon the faith of which another party has been induced to act or reply to his own prejudice; for instance, a voluntary misstatement of fact by A: Misrepresentation.
such as a misrepresentation of the property in goods, whereby a party, B, is deceived precludes A from denying such property in a suit between A and B: *Freeman v. Cooke*, 2 Exch. 654; so where a negotiable security is entrusted by the owner to an agent for a specific purpose, any innocent transferee for value from the agent acquires a good title against the owner: *Goodwin v. Roberts*, 1 Ap. Cas. 476. As Silence.
to an estoppel arising from silence: see *McKenzie v. Br. Linen Co.*, 6

Ap. Cas. 82. Under the Judicature Act estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded: *Cooper et al. v. The Molsons Bank*, 26 S. C. R. 611.

The decision of a Court on a question which is beyond its statutory jurisdiction is not *res judicata*, and cannot be pleaded as an estoppel: *Toronto Ry. v. Toronto Corporation*, 73 L. J. P. C. 120; (1904) A. C. 809; 91 L. T. 541; 20 T. L. R. 774.

Judgment
by default.

A judgment by default may operate by estoppel, but the ground and extent of that estoppel must be found on the face of the judgment itself, and cannot be inferred or deduced from the pleadings of the party who has obtained the judgment where the defendant has said nothing, and has merely allowed the judgment to go by default. An unnecessary averment in a record that is neither pleaded to nor admitted cannot be used as an estoppel: *Irish Land Commission v. Ryan* (1900), 2 Ir. R. 565.

Books of account are not conclusive against the person making them, but may be explained: *Raymond v. Cummings*, 1 P. & B. 544 (N. B.)

Not
answering
letters.

A person is not legally bound to answer and does not incur any liability by not answering letters addressed to him by persons to whom he stands in no personal relation: *British Linen Co. v. Cowan*, 8 F. 704.

In an action for infringement of a patent the plaintiff obtained judgment for an injunction and enquiry as to damages. The defendants subsequently discovered evidence of prior user, on which they obtained an order for the revocation of the patent. *Held*, that the defendants were estopped by the judgment in the action from setting up the invalidity of the patent on the enquiry as to damages: *Poulton v. Adjustable Cover and Boiler Block Co.*, 77 L. J. Ch. 780; (1908) 2 Ch. 430; 99 L. T. 647; 24 T. L. R. 782—C.A.

Share-
holder.

A person who applies for and is allotted shares under an *alias* is estopped from disputing his liability as a shareholder: *Coventry's Case* (60 L. J. Ch. 186; (1891) 1 Ch. 202), distinguished. *Pugh and Sharman's Case* (41 L. J. Ch. 580; L. R. 13 Eq. 566), followed. *Central Klondyke Gold Mining and Trading Co., In re; Savigny's Case*, 5 Manson, 336.

Latent de-
fect.

The purchaser of goods, subject to a latent defect, sold with a warranty, is not estopped from claiming for breach of the warranty, when sued for the price, by having received the goods without objection made at the time: *Smith v. Archibald*, 41 N. S. R. 211.

PROOF OF DOCUMENTS.

As a general rule before a document can be proved at a trial it must itself be produced in Court, but there are

certain documents of a public character which either at common law or by statute are provable by copies without production of the original in Court. The various kinds of copies by which original documents may in general be proved may be classed under four heads: viz. 1. Exemplifications; 2. Office Copies; 3. Examined Copies; 4. Certified Copies.

Exemplifications are of two kinds: Under the Great Seal, or under the Seal of the Court in which the record is preserved.

An office copy, that is, a copy made by the office having custody of the document, always was in the same Court and in the same cause equivalent to the document of which it was a copy. Where a copy is made by a public officer specially intrusted to make copies and to deliver them to the parties as part of their title, they are admissible in evidence without proof of having been actually examined. The contents of a document of a public nature required by law to be kept may be proved by producing a copy verified by the oath of a witness who has compared it with the original and will swear that it is complete and correct. What are public documents in this sense has never been very accurately defined; but the term seems to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit: *Lynch v. Clerke*, 3 Salk. 154. The term would clearly include all records of any Court whatsoever, and all registers of births, deaths, and marriages; registers having reference to shipping and navigation, to trade and public health. The rule applies equally to such public registers kept abroad, as there is a presumption that the foreign authority in whose custody they are would not allow their removal to this country: *Abbott v. Abbott*, 29 L. J. P. M. & A. 57.

An examined copy of a record or other document must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original: *Reid v. Margison*, 1 Camp. 469. Where an examined copy is put in evidence, some account should be given of the original record, thus it ought to be shown that the record from which the copy was taken was seen in the hands of the proper officer, or was in the proper place for the custody of such records: *Adamthwaite v. Synge*, 1 Stark. 183. The object of 8 & 9 Vict. c. 113, s. 1, Imperial Documentary Evidence Act, seems to have been to dispense with proof of the genuineness of the document in all cases where it is by statute made evidence of the facts to which it relates: *R. v. Parsons*, L. R. 1 C. C. 24. It is not sufficient for a party to any litigation on whom the onus is, to say that he could furnish the record.

sary proof if he had certain papers. It is his duty to have these papers, or to have them produced, the means of having their production being what the law deems ample: *Exchange Bank of Canada v. Springer and Barnes*, 7 O. R. 309; 14 S. C. R. 716. A copy of an order and of a writ of execution issued pursuant thereto, admitted in evidence, an official in the office where the same had been filed testifying that he had made the copies from the originals, which were proved to have been lost: *Wardrope v. Canadian Pacific R. W. Co.*, 7 O. R. 321.

PROOF OF DOCUMENTS (ALPHABETICALLY ARRANGED).

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AFFIDAVITS AND DEPOSITIONS.

A deposition used by a party to a suit in Chancery for the purpose of proving certain facts, is primary evidence of the same facts against the same party in an action by a stranger: *Richards v. Morgan*, 4 B. & S. 641. But such depositions are not in general admissible without proof of the bill and answer: *B. N. P.* 420; unless no bill or answer can be found: *Bayley v. Wylie*, 6 Esp. 85; or unless the depositions are offered in evidence as containing an admission merely or for the purpose of contradicting a witness. The bill and answer are only required to satisfy the judge that the depositions are admissible by enabling him to see what was in issue, and the opposite party therefore has no right to have them read or to comment upon them to the jury: *Chappell v. Purdy*, 14 M. & W. 303. Affidavits taken by the standing commissioners of the Superior Courts may be proved without producing the commission. The acting as such is *prima facie* sufficient proof of it: *R. v. Howard*, 1 M. & Rob. 187. The handwriting of the commissioner must be proved, and that of the deponent, if the original is produced. But if the affidavit be filed in a Superior Court an examined copy (or in the same Court and cause, an office copy), of it is in civil cases evidence against the party by whom it has been used or acted on without proof of the handwriting of the person making it: *Fleet v. Perrins*, L. R. 3 Q. B. 536.

An affidavit verifying the copy of a paper "that it is a true copy as the deponent is informed and verily believes," is sufficient: *Shafe v. Parr*, 2 U. C. R. 98. Held, approving *Spafford v. Buchanan*, 3 O. S. 391, that in an action for malicious arrest on a *ca. sa.*, the affidavit is sufficiently proved by a copy of the original filed in the Crown office; and that the identity of defendant with deponent may be presumed *prima facie* from the name: *Wilson v. Thorpe*, 18 U. C. R. 443. Extracts from a letter embodied in an affidavit cannot be noticed; either the whole letter or a copy should be before the Court,

or at least it should be sworn that the letter contains nothing more relating to the action: *Vaughan v. Ross*, 8 U. C. R. 506. In an action for goods sold, the question was the authority of one McA. to bind defendants as their agent: Held, that an affidavit made by McA. describing the nature of his agency, and filed by defendants on a motion for a new trial in another suit brought by this plaintiff against them, was clearly admissible against defendants: *Thayer v. Street*, 23 U. C. R. 189.

Notary
Public
need not
affix seal on
affidavits.
(30)

Section 8 of Ontario Statutes, 1909, c. 63, The Notaries Act, provides that a Notary Public need not affix his seal to affidavits or declarations taken before him.

Sections 38 to 41 of the Evidence Act of Ontario * are as follows:

Affidavits, etc., made out of Ontario.

Affidavits
to be used
in Ontario
may be
made be-
fore cer-
tain func-
tionaries in
other
countries.

38. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of Ontario—

(a) In England or Ireland before a commissioner authorized to administer oaths in the Supreme Court of Judicature of England or Ireland;

(b) In England or Ireland before a Judge of the Supreme Court of Judicature of England or Ireland;

(c) In Scotland before a Judge of the Court of Session or the Justiciary Court of Scotland;

(d) Before a Judge of any of the County Courts of Great Britain or Ireland, within his county;

(e) In Great Britain or Ireland, or in any colony of His Majesty, or in any foreign country before the mayor or chief magistrate of any city, borough or town corporate, certified under the common seal of such city, borough, or town corporate;

(f) In any colony belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country, before a Judge of any Court of Record or of supreme jurisdiction.

(g) In the British possessions in India, before any magistrate or collector certified to have been such under the hand of the Governor of such possession;

* Compare

R. S. B. C., none.

R. S. Man., ss. 51 to 53, 56.

R. S. N. B., c. 57, s. 13.

R. S. N. S., s. 48.

(h) In Quebec, before a Judge or prothonotary of the Superior Court or clerk of the Circuit Court;

(i) In any foreign place, before any consul, vice-consul, or consular agent of His Majesty exercising his functions;

(j) Before a notary public and certified under his hand and official seal;

(k) Or before a commissioner authorized by the laws of Ontario to take such affidavits;

Shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits therein, or other competent authority of the like nature.

39. Any document purporting to have affixed, impressed or subscribed thereon or thereto the signature of such judge or commissioner, or the signature and official seal of such notary public, or prothonotary, or the seal of the corporation, and the signature of such mayor or chief magistrate or Governor as aforesaid, or the seal and signature of such consul, vice-consul or consular agent in testimony of such oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, or for any other purpose authorized by this Act, shall be admitted in evidence without proof of such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature the same purport to be, or of the official character of such person.

Seal and signature need not be proved.

Formal Defects in Affidavits.

40. No informality in the heading, or other formal requisites to any affidavit, declaration or affirmation, made or taken before a commissioner or other person authorized to take affidavits under the "Commissioners for taking Affidavits Act," or under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered thinks proper to receive it.

Informal headings, etc., not to invalidate

41. Where an examination or deposition of a party or witness has been taken before a Judge or other officer or person appointed to take the same, copies of the examination or deposition certified under the hand of the Judge, officer or other person taking the same, shall, without proof of the signature, be received and read in evidence, saving all just exceptions.

Copies of depositions certified by person taking the same admissible in evidence.

By R. S. N. S. (5 ser.) c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides*, "as nearly as may be" in

the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn to at _____ in the county of _____, this _____ day of _____, A.D. _____. Before me a commissioner, etc.:" Held, that where the jurat to an affidavit was "sworn to at Middleton, this 6th day of July, A.D. 1891," etc., without naming the county, the mortgage was void notwithstanding the affidavit was headed "in the county of Annapolis:" (*Archibald v. Hubley*, 18 S. C. R. 116, followed; *Smith v. McLean*, 21 S. C. R. 355, distinguished); *Morse v. Phinney*, 22 S. C. R. 563. The Bills of Sale Act, Nova Scotia, R. S. N. S. (5 ser.) c. 92, by section 4, requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act; and by section 5, if the mortgage is to secure a debt not matured, the affidavit must follow another form. By section 11 either affidavit must be "as nearly as may be" in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms: Held, that this affidavit was not "as nearly as may be" in the form prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same, the mortgage was void for want of such compliance: *Reid v. Creighton*, 24 S. C. R. 69.* Held, following *Mathinson v. Patterson* (1892), 19 A. R. 188, and *Martin v. Sampson* (1896), 24 A. R. 1, that an error in the statement of the indebtedness in the affidavit of *bona fides* sworn to by the plaintiff, and attached to the chattel mortgage, was not in the absence of fraud fatal to its validity: *Bernhart v. McCutcheon*, 12 M. L. R. 393 (Man.) Held, that such affidavit or affirmation, if a corporation is proprietor of the newspaper, may be made by the managing director; that there is an option either to swear or affirm, and the right to affirm is not confined to members of certain religious bodies or persons having religious scruples; and that if the affidavit or affirmation purport to have been taken before a commissioner, his authority will be presumed: *Ashdown v. Manitoba "Free Press" Co.*, 20 S. C. R. 43.

The evidence of a witness who has left the province since a former trial between the parties may be read from the Judge's notes: *Abel v. Light*, 6 All. 423 (N.B.)

Depositions of deceased as evidence at trial: *Johnston v. Birkett*, 1 O. W. N. 917.

The Ontario Division Courts Act (Ont. Statutes, 1910, c. 32) provides:

* The above two cases deal with compliance with statutory form of affidavit.

Books of Accounts, Affidavits, etc., as Evidence.

119. In an action for a debt or money demand, of not more than \$25, and in case of a defence of set-off or of payment, so far as the same extends to \$25, the Judge on being satisfied of their general correctness may receive the plaintiff's, defendant's or garnishee's books as evidence, and may also receive as evidence the affidavit of any party or witness resident out of the county, but may require the party or witness to answer written interrogatories upon oath.

120. (1) Affidavits may be sworn before a clerk or deputy clerk, or before a Justice of the Peace, notary public or commissioner for taking affidavits.

(2) An affidavit sworn before the agent of the party on whose behalf it was made or before the clerk or partner of such agent shall not be used.

Though evidence must generally be given *viva voce* on oath, and in the very cause in which the witnesses are sworn, yet the testimony of witnesses so taken in another cause between the same parties upon the same issue is admitted where their personal attendance cannot be procured. Thus, where a witness was examined in a former action, on the same point, between the same parties, his testimony may be proved if he has since died: *B. N. P.* 242; or if he appears to be kept away by contrivance: *Ib.*, 243. It seems to be enough if the parties to the two actions are substantially, though not nominally, the same: *Wright v. Tatham*, 1 Ad. & E. 18; so if the parties and the title in issue are the same, the evidence is admissible, though the land sought to be recovered is different; but where the parties are neither the same, nor in privity with each other, such testimony is not admissible, though the title and one of the parties may be the same: *Morgan v. Nicoll*, L. R. 2 C. P. 117. The admissibility of this evidence turns rather on the right to cross-examine than upon the precise identity, either of the parties or the points in issue in the two proceedings. In some cases such depositions are evidence even *inter alios*. Thus depositions relating to a question upon which hearsay would be good evidence may be read against the person who was no party to the former suit. So a deposition taken in a cause between other parties will be admitted to be read to contradict what the same witness swears at a trial, and it will be evidence in any case against the deponent himself. The statements in a bill of equity under oath are evidence against the party filing it in an action at law: *Doe dem. Palmer v. Ross*, 5 All. 346 (N.B.). Where a party intends to avail himself of a decree, and not merely to prove an extrinsic collateral fact (as that a decree was made by the Court), he ought regularly to give in evidence the proceedings upon which the decree was founded: *Eaton v. Wright et al.*, 2 R. & C. P. 514 (N.S.).

Judge may receive in evidence plaintiff's or defendant's books of account.

Affidavits may be sworn before a clerk, etc.

Affidavits sworn before agents not to be used

Testimony of witnesses in another cause.

When good *inter alios*.

ANCIENT WRITINGS.

When a deed is thirty years old it proves itself, and no evidence of execution is necessary: *B. N. P.*, 255; even in cases where attestation is requisite, and it appears that the attesting witness is alive and able to attend it is unnecessary to call him where the instrument is thirty years old: *Oldham v. Wolly*, 8 B. & C. 22. But where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody: *B. N. P.*, 255; or it should be shown that possession has accompanied it, at least where it purports to convey something which is the subject matter of possession. Interlineations, etc., in a deed are presumed to have been made before execution: *Tatum v. Catmore*, 16 Q. B. 745. It was formerly considered that if there was any erasure or interlineation in an old deed it ought to be proved in a regular manner by the witness, if living, or by proof of his handwriting; and that of the party, if dead, in order to obviate the presumption which otherwise arises against the instrument: *B. N. P.* 255. In documents of remote antiquity it is evidently impossible to supply such proof, and accordingly in such documents defects of this kind are in practice treated only as matter of observation to the jury unless they are of sufficient importance to warrant the judge in excluding them altogether: *Evans v. Rees*, 10 Ad. & E. 151.

In ejectment the plaintiffs claimed through two deeds over thirty years old, in proof of which they shewed one to have come from the custody of the former owner's agent and the other to have been produced under a written order from the agent:—Held, sufficient proof of their having come from the proper custody without calling the agent who had charge of them: *Cook v. Christie*, 12 U. C. C. P. 517. Deeds purporting to be upwards of thirty years old were produced from the custody of the solicitors of the plaintiffs, who claimed as trustees, and one of which solicitors was a plaintiff in the action. The plaintiffs claimed under these deeds through several mesne conveyances. The solicitor-plaintiff had once recovered judgment in ejectment for the land in question as one of the three trustees: Held, that the deeds were produced from the proper custody to entitle them to be received in evidence as ancient documents: *Thompson v. Bennett*, 22 U. C. C. P. 393. A memorial more than thirty years old of a lost deed is good evidence upon its bare production, without calling or accounting for the subscribing witness. Semble, this principle extends to any written document, even to letters: *Macklem v. Turnbull*, 5 U. C. R. 129. Although an ancient deed, produced from the proper custody, proves itself, this does not preclude a party interested from proving the deed a forgery or invalid on any other ground: *Chamberlain v. Torrance*, 14 Chy. 181. In general the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and from which their genuine-

ness may be inferred. The admissibility of the evidence is for the determination of the Court. Proper custody seems to be that within which the document may be reasonably expected to be found, although in strictness it ought to be in another place, *e.g.*, a collector's book produced from the possession either of his executor or his successor: *Jones v. Waller*, 3 Will. 517. The production of an original mortgage, which was more than twenty years old, proves itself under R. S. O. 1897, c. 134, s. 2, s.s. 1, which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue: *Allan v. McTavish*, 28 Chy. 539, 8 A. R. 440.

The Ontario Act to simplify titles, known as the Vendors and Purchasers' Act, Ont. Statutes, 1910, c. 58, provides as follows:

2. In the completion of a contract of sale of land, the rights of sale of and obligations of vendors and purchasers shall (subject to any Recitals, stipulation in such contract to the contrary), be regulated by the etc., 20 following rules: years old, of facts,

(a) Recitals, statements and descriptions of facts, matters and etc., *prima facie* evidence parties contained in statutes, deeds, instruments, or statutory declarations twenty years old at the date of the contract, unless and except so far as they are proved to be inaccurate, shall be sufficient evidence of the truth of such facts, matters and descriptions.

(b) A registered memorial of a discharged mortgage shall be Memorials sufficient evidence of the mortgage without the production of the of discharged mortgage, unless and except so far as such memorial is proved to be mortgages inaccurate; and the vendor shall not be bound to produce the mortgage unless it is in his possession or power.

(c) A registered memorial twenty years old, of any other in-Memorials strument, if the memorial purports to be executed by the grantor, 20 years old, when, or in other cases, if possession has been consistent with the registered and of title, shall be sufficient evidence without the production of the instrument to which the memorial relates, unless and except so far as such memorial is proved to be inaccurate; and the vendor shall not be bound to produce the original instrument unless it is in his possession or power; and the memorial shall be presumed to contain all the material contents of the instrument to which it relates.

(d) The inability of the vendor to furnish the purchaser with a Inability legal covenant to produce and furnish copies of documents of title, to furnish shall not be an objection to the title if the purchaser will, on the covenant completion of the contract, have an equitable right to the production to produce and of such documents, furnish documents of title.

(3) In an action it shall not be necessary to produce any Evidence evidence which, by section 2, is dispensed with as between vendor in action.

and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall *prima facie* be sufficient for the purposes of such actions.

To the same effect section 54 of the Evidence Act.

AWARDS.

An award regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law between the parties to the reference, upon all matters inquired into within the submission: *Campbell v. Twemlow*, 1 Price, 81. Corruption or misconduct of the arbitrator, including the case of an award made *ex parte*, does not invalidate the award, in any case, at least, in which application might have been successfully made to the Court to set it aside. An award is not evidence as between strangers, nor in a matter in which hearsay is admissible: *Evans v. Rees*, 10 Ad. & E. 151. So an award against a principal debtor is not evidence in an action against his surety: *Ex parte Young*, 17 Ch. D. 668.

An umpire or single arbitrator occupies a judicial position and is bound so far as practicable to follow legal rules. He is not entitled in the course of an arbitration, when either side objects to his so doing, himself to call a witness and examine him. Dictum of Lord Esher, M.R., in *Coulson v. Disborough* (1894), 2 Q. B. 316, 318, disapproved of: *Enoch and Zaretsky, In re*, 79 L. J. K. B. 363; (1910), 1 K. B. 327; 101 L. T. 801—C. A.

BANK BOOKS.

The local manager of a branch in this Province of a chartered bank, when served with a *subpœna duces tecum* to attend as a witness before the Court or a master upon a reference in an action, is bound, whether the bank is a party or not, to produce the bank books specified in the *subpœna* which are in his custody or control, containing an entry relevant to the matters in question in the action, and to give evidence as to such entries; and inconvenience to the bank is no ground for refusing to produce the books, which *prima facie* are to be deemed in his custody and control, and their production within the scope of his authority: *Re Dwight and Macklem*, 15 O. R. 148, approved and followed. Evidence as to a customer's account is not privileged at common law, and section 46 of the Bank Act is no more than a prohibition against a bank voluntarily permitting any examination of customer's accounts save by a director. Discussion of the

English Bankers' Books Evidence Act, 1879: *Hannum v. McRae*, 17 P. R. 567, 18 P. R. 185.

CONVICTION.

It is a general rule that the judgments of all Courts of competent jurisdiction are conclusive for the purpose of protecting their judicial officers, acting within the scope of their authority: *Basten v. Carew*, 3 B. & C. 653. The record of a conviction is inadmissible as evidence of the same fact coming into controversy in a civil suit: *Castrique v. Imrie*, L. R. 4 H. L. 434. A plea of guilty on an indictment for assault is evidence by way of admission against the defendant in an action for that assault: *R. v. Fontaine Morcau*, 11 Q. B. 1033; though a verdict of guilty would not be evidence: *R. v. Warden*, 12 Mod. 337. *Semble*, that a conviction returned under the statute to the Quarter Sessions, and filed by the clerk of the peace, becomes a record of the Court, and may be proved by a certified copy: *Graham v. McArthur*, 25 U. C. R. 478. Proof of quashing of conviction by the Court of Queen's Bench—a rule of Court was put in, in which the offence, the name of the complainant, and of the magistrate, were mentioned: Held, sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the Court would not presume another conviction similar in all these respects: *Bross v. Huber*, 15 U. C. R. 625.

Section 19 of the Ontario Evidence Act is as follows:

19. (1) A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved; and a certificate containing the substance and effect only (omitting the formal part) of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the officer, shall upon proof of the identity of the witness as such convict, be sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

(2) For such certificate a fee of \$1 and no more may be demanded or taken.

CORPORATION BOOKS.

The official acts of a municipal corporation registered in books may be proved by the production of them: *Thetford Case*, 12 Vin. Ab. 90. To make the books evidence it must appear that they come from the proper custody. When the entries in the books are admissible as being of a public nature, examined copies are evidence: *Brocas v. London*,

Mayor of, 1 Stra. 307. An erasure on the entry in the minute book of a corporation must be presumed to have been made before the entry was signed: *Steevens Hosp. v. Dyer*, 15 Ir. C. R. 405. Public official acts of the municipal corporation registered in other books, regularly kept and entered by the proper officers, may and ought to be proved by the books themselves, which are evidence of them, even against strangers: *R. v. Mothersell*, 1 Stra. 93. But the books of a corporation, whether public or private, are not admissible in their own favour as to matters of a private nature; as to establish a claim to a toll: *Bret v. Beales, M. & M.* 419. Defendant's secretary, called by the plaintiffs, produced copies of the proceedings of defendant's London board, which he said had been sent by them to the board in Canada as such copies, but which he could not prove otherwise to be so: Held, clearly sufficient: *Commercial Bank v. Great Western R. W. Co.*, 22 U. C. R. 233. The defendants were sued on a by-law alleged to have been made by them, enacting that all persons who at the time of subscribing should pay up their stock in full should be entitled to interest on the amount of their investment. The defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed with the president's initials: Held, that such proof, even without the entry in the margin, would have been insufficient to shew a by-law: *McDonell v. Ontario, Simcoe and Huron R. W. Co.*, 11 U. C. R. 267.

CORPORATION DEEDS.

Where a witness stated that he had good opportunities, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself and from the signature of the party attached to it, with which he was acquainted: Held, sufficient to go to a jury to authenticate the seal: *Doe d. King's College v. Kennedy*, 5 U. C. R. 577.

Presump-
tion of
execution.

Fixing the common seal is tantamount to delivery. The seal must be proved by some one who knows it, but it is not necessary to call a witness who saw it affixed: *Moises v. Thornton*, 8 T. R. 307. If the seal of a corporation is attached to an instrument it will be presumed as against them to have been regularly attached, and it lies on them to give strict proof to the contrary so as to exclude such presumption: *Clark v. Imp. Gas Co.*, 4 B. & Ad. 315. The presumption may, however, be rebutted by evidence: *Anon.*, 12 Mod. 423. A person who manages the affairs of a trading corporation must of necessity have power to use the corporation seal for those acts he is authorized to perform: *Ex parte Contract Corp.*, L. R. 3 Ch. D. 105. The name of a corporation as stated in a deed must be the same in substance with the true name, but need not be the same in words or syllables: *R. v.*

Haughley, 4 B. & Ad. 650. The seal of a corporation having been proved: Held, that the production of a document within the powers of the corporation with the seal attached, is sufficient *prima facie* evidence of its proper execution: *Woodhill v. Sullivan*, 14 U. C. C. P. 265; *Pell v. South*, 24 U. C. R. 196. To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such: *Smith v. Redford*, 12 Chy. 316. Some of the parties executing a deed were corporate bodies and the witnessing clause was expressed: "In witness whereof the said parties hereto have hereunto set their hands and seals," &c., and the seals were all simple wafer seals:—Held, sufficient, in the absence of evidence shewing these not to be the proper corporate seals: *Ontario Salt Co. v. Merchants Salt Co.*, 18 Chy. 551. A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations: *Bernardin v. North Dufferin*, 19 S. C. R. 581. If a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment: *Hamilton School Trustees v. Neil*, 28 Chy. 408. Where work done for a corporation is such as was evidently contemplated by their charter, and they have accepted and availed themselves of it, they cannot refuse to pay on the ground that there was no contract under seal: Held, therefore, that the Hamilton and Gore Mechanics' Institute were liable to the plaintiff for services rendered by him as an architect, upon a verbal agreement, in preparing plans and superintending the erection of a hall for their accommodation: *Clark v. Hamilton and Gore Mechanics' Institute*, 12 U. C. R. 178. The objection that a corporation cannot be bound unless under the corporate seal, is applicable only to actions at law: *Brewster v. Canada Co.*, 4 Chy. 443. Where the directors of a company had power to appoint officers and agents, and dismiss them at pleasure: Held, that their appointment of a solicitor need not be under the corporate seal: *Clarke v. Union Fire Ins. Co.; Caston's Case*, 10 P. R. 339. The plaintiff being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants: Held, that the plaintiff had a right to do so: see *Harvey v. Grand Trunk R. W. Co.*, 7 A. R. 715. A corporation may be liable for false imprisonment under an order of its agent acting within the scope of his authority: *Lyden v. McGee*, 16 O. R. 105. An action will lie at the suit of an incorporated trading company, to recover damages for a libel calculated to injure their reputation in the way of their business: *South*

Liability
on
executed
contract.

Libel on
corporation.

Hetton Coal Co. v. North-Eastern News Association (1894), 1 Q. B. 133, followed. *Journal Printing Co. v. MacLean*, 25 O. R. 509, approved; *Journal Printing Co. v. MacLean*, 23 A. R. 324. Review of the cases as to the liability of a corporation by parol both at law and in equity: *Davis v. Canada Farmers' Mutual Insurance Co.*, 39 U. C. R. 452. Contracts not under the corporate seal made with trading companies relating to purposes for which they are incorporated, if partly performed and of such a nature as would induce the Court to decree specific performance if made between ordinary individuals will be enforced against them: *Ontario and Western Lumber Co. v. Citizens' Telephone and Electric Co.*, 16 C. L. T. Occ. N. 118.

Contracts
partly
performed.

DEEDS.

See PRIVATE DEEDS AND WRITINGS, PAGE 81.

FOREIGN LAW.

Courts cannot take cognizance of the laws of foreign states; they must be proved as facts: *Mostyn v. Fabrigas*, Cowp. 174. In an appeal from the Colonial Court the judicial committee of the Privy Council must take judicial cognizance of the laws of the colony. The written law of a foreign state is properly receivable only from oral evidence, although the witness may refresh his memory from the written law: *Sussex Peerage Case*, 11 Cl. & F. 114. Foreign law should be proved by witnesses of competent skill. The evidence of an English lawyer who had studied the foreign law is not admissible: *In re Bonelli*, 1 P. D. 69. The competency of the witness to prove foreign law is a question for the Court, and the only general rule is that the witness must, from his profession or business, have had means of becoming acquainted with that branch of law which he is called to prove: *Vanderdonckt v. Thellusson*, 8 C. B. 812. The written law of a foreign country may be proved by a skilled witness without the production of the law itself, but where it can be produced, it is more satisfactory than verbal testimony: *Osgood v. Hatch*, Mich. T. 1872 (N.B.). A witness must state some ground professional or practical on which his knowledge rests to qualify him to speak of the law of a foreign state. It is not enough for such a witness to say that he is familiar with the foreign law without stating the ground on which his knowledge rests. Where a witness had resided in this Province, as American Consul, for six years, during which time certain currency laws were passed in the United States, of which his only knowledge was derived from having them transmitted to him:—*Held*, that this was not a sufficient qualification in the absence of an assertion that his official duties required him to acquaint himself with the currency laws of his country: *McKenzie v.*

Gordon, 1 N. S. D. 153 (N.S.). A president of a bank in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country as to what is money there: *Third National Bank of Chicago v. Cooby*, 43 U. C. R. 58. Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion: *Rice v. Gunn*, 4 O. R. 579. Where the evidence of persons skilled in the foreign law is conflicting the Court may examine for itself the decisions of the foreign Court and text writers in order to arrive at a conclusion of the foreign question of the foreign law: *Everitt v. Township of Raleigh*, 1 O. W. N. 718; *O'Reilly v. O'Reilly*, 1 O. W. N. 742. Failing information, foreign law must be presumed to agree with law of this Province. Presumption of foreign law. See *Re O'Brien*, 3 O. R. 326; *Langdon v. Robertson*, 13 O. R. 497. The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different: *Canadian Fire Insurance Co. v. Robinson*, 31 S. C. R. 488. Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago, on margin, which the latter did, advancing them money, for which they sued. Defendants having refused to settle for losses sustained: Held, that assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing, and this defence, not having been clearly proved, judgment was given for the plaintiffs: *Rice v. Gunn*, 4 O. R. 579. It is not desirable even with the consent of parties that the Court should construe the law of a foreign country instead of the fact of what is the law there being proved by lawyers of such foreign country: *Mcagher v. Aetna Insurance Co.*, 20 Chy. 354. Evidence of the custom of brokers at Toledo, U.S., the contract being made in Ontario, was:—Held, to have been properly rejected: *Williams v. Corby*, 5 A. R. 626, 7 S. C. R. 470. An action will not lie in this Province by a judgment creditor to set aside as fraudulent a conveyance made by his debtor of lands situate in a foreign country when the creditor has no remedy there, although all the parties reside in this Province. Although the Court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce: *Burns v. Davidson*, 21 O. R. 547. The Courts in this Province have no jurisdiction to entertain an action for determin-

ing the title to lands in the North-West Territories, even though the parties be resident here: *Ross v. Ross*, 23 O. R. 43:—Held, that the Court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here: *Credits Gerundouse v. Van Weede*, 12 Q. B. D. 171, distinguished: *Re Benfield and Stevens*, 17 P. R. 339. A foreign legislature can make no law creating a lien on real estate in Canada, and any contract founded on such a consideration is void *ab initio*: *Genesee Mutual Ins. Co. v. Westman*, 8 U. C. R. 487. After judgment at the trial, but before the argument *in banc*, the defendants put in the report of a case bearing upon the question decided in the Supreme Court of the United States, verified by affidavit:—Held, admissible: *Rice v. Gunn*, 4 O. R. 579. A contract for the sale of goods to plaintiff at a certain price, payable in Toronto, was made by defendant at Chicago through his agent there, the goods to be shipped by the G. T. R. from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that s. 17 of the Statute of Frauds was not in force in Illinois:—Held, that the contract being valid where it was made could be enforced here though not in writing: *Green v. Lewis*, 26 U. C. R. 618. The rights of parties resident in a foreign country and there making a contract in regard to goods in Ontario, so far as the formalities of registration or change of possession are concerned, are governed by the law of Ontario: *River Stave Co. v. Sill*, 12 O. R. 557, followed; *Marthinson v. Patterson*, 20 O. R. 125; 19 A. R. 188. A Canadian Court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the Court not being able to assume that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought: *Burns v. Davidson*, 21 O. R. 547, *ut supra*, followed; *Purdom v. Pavey & Co.*, 26 S. C. R. 412. A judgment of a foreign Court having the force of *res judicata* in the foreign country has the like force in Canada. Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained: *Law v. Hansen*, 25 S. C. R. 69. Where a note is payable at a particular place, but does not contain the words “and not otherwise or elsewhere,” the *lex loci contractus*, and not the *lex loci solutionis* prevails: *North-Western National Bank v. Jarvis*, 2 M. L. R. 53 (Man.). An assignment or conveyance under foreign bankruptcy proceedings is ineffectual to pass title to lands in Canada: *Macdonald v. Georgian Bay Lumber Co.*, 2 S. C. R. 364. A bill of sale made between parties, and in respect to a subject matter out of the Province:—Held, not within Bills of Sale Act:

Singer Sewing Machine v. McLeod, 20 N. S. R. (S. R. & G.) 311, 9 C. L. T. 60 (N.S.). Though a debt has no absolute legal existence, yet it is a well settled rule that it possesses an attribute of locality. A simple contract debt is within the area of the local jurisdiction within which the debtor for the time being resides. The locality of a special debt is where the specialty is found at the time of the creditor's death: *Connors v. Hope* (1891), A. C. 476. In a contract between persons living in different countries under different systems, it is a question in each case how the parties intended that their rights either under the whole or any part of the contract were to be interpreted. The contract between A., a Scotch distiller, and B., a merchant in London, was made in England but was to be performed in Scotland. It contained an arbitration clause for reference to two members of the London Corn Exchange or their umpire:—Held, that the law of England, and not that of Scotland, applied to the arbitration clause: *Hamlyn v. Talisker* (1894) A. C. 202. The liability of a master to his servant for an accident in the course of his work does not arise from the contract of hiring between them; it arises out of tort, and is governed by the law of the country where the tort is committed. Where the law of the place recognizes the liability, the Court should not be bound by an exception which it makes, drawn from a presumption that the circumstances take it out of the rule: *Lee v. Logan*, Q. R. 31 S. C. 469, 3 E. L. R. 132; *Logan v. Lee*, 30 S. C. R. 311. Change of domicile by evidence of intention as affecting the status of husband and wife discussed: *Re Martin* (1900) C. A. P. 211. The mutual rights of a husband and wife, as to personal property of each at the time of their marriage, are governed by the law of the matrimonial domicile, and are not affected by a subsequent change of domicile. Where the law of a foreign State (Ohio) has not been proved, the Court in this province is justified in assuming, in the absence of special circumstances, that the common law prevails in that foreign State: *Pink v. Perlin & Co.*, 40 N. S. R. 260.

In the acquisition of a new domicile more is required than a mere change of residence; there must be proved a fixed intention to renounce birthright in the place of original domicile and to adopt the political and municipal *status* involved by permanent residence of choice elsewhere than in the domicile of origin: *Huntly (Marchioness) v. Gaskell*, (No. 2), 75 L. J. P. C. 1; (1906) A. C. 56; 94 L. T. 33; 22 T. L. R. 144. Foreign judgment—action on; defence of no jurisdiction, the defendants not domiciled in Province where judgment obtained: *North v. Fisher*, 6 O. R. 206, referred to; *Brennan v. Cameron*, 1 O. W. N. 430. The English Courts will not enforce any agreement made in a foreign country which has been obtained by a coercion, either physical or moral, although such agreement was to be performed

in the foreign country and may be valid by the law of that country: *naufman v. Gerson*, 73 L. J. K. B. 320; (1904) 1 K. B. 591; 90 L. T. 608; 52 W. R. 420; 20 T. L. R. 277. A contract between parties resident in different jurisdictions is to be construed, in respect of its national character, by the intention expressed therein: *Spurrier v. La Cloche*, 71 L. J. P. C. 101; (1902), A. C. 446; 86 L. T. 631; 15 W. R. 1. Money lent for the purpose of gambling in a country where the games in question are not illegal may be recovered in the Courts of this country: *Quarrier v. Colston*, 1 Phillips 147, followed; *Saxby v. Fulton*, 78 L. J. K. B. 781; (1909), 2 K. B. 208; 53 S. J. 379; 25 T. L. R. 446—C.A.

Goods in Ontario at the time of execution of chattel mortgage are subject to R. S. O. c. 125, although the parties are at the time domiciled in a foreign country: *Marthinson v. Patterson*, 20 O. R. 720.

In actions *in rem* by masters of foreign ships for wages and disbursements, questions of lien and priorities are to be decided by the *lex fori*. Section 167 of the Merchant Shipping Act, 1894, giving remedies to a master for his wages, disbursements and liabilities, applies to masters of foreign ships notwithstanding the provisions of section 260: *The Milford* (Sw. 362), discussed and followed.

The Tagus, 72 L. J. P. 4; (1903), P. 44; 87 L. T. 598; 9 Asp. M. C.

Sale of goods.

The sale on trial of goods ordered from a vendor abroad is governed in the absence of special agreement, by the law of the province, and not by that of the country of the vendor. Therefore, when the article is lost during the trial and before manifestation of the will to buy, the loss falls on the vendor: *Laurin v. Ginn*, Q. R. 18 K. B. 116. Held, following *Bonin v. Robertson*, 2 Terr. L. R. 21, that the laws in force where the property is situate and the parties reside at the time a contract for sale is made must govern; and therefore where under the laws of Manitoba, goods were delivered to purchaser upon terms that no property therein was to pass until such goods were fully paid for, which agreement was valid and enforceable in Manitoba without registration:—Held, that the seller might claim such goods when removed into Saskatchewan as against execution creditors and other persons claiming such goods, notwithstanding that no copy of such agreement had been registered as required by c. 44 of the Consolidated Ordinances: *Sawyer and Massey Co. v. Boyce*, 1 Sask. L. R. 230; 8 W. L. R. 834.

Penal laws

The Courts of this country will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action: *Hunt-ington v. Attrill*, 18 A. R. 136. A creditor recovered judgment in Manitoba, and had by virtue of an Act of that province a lien on

the lands of the judgment debtor there. As judgment creditor he brought an action in Ontario against the debtor's mortgagees to redeem lands in Manitoba as being subject to the lien. The Court dismissed the action as not being within its jurisdiction: *Henderson v. Bank of Hamilton*, 20 A. R. 646.

The validity of a bequest determined by law of testator's domicile which, in the absence of evidence to the contrary, was presumed to be the same as the law of Ontario: *Graham v. Canandaigua*, 24 O. R. 547. Where all parties reside in Ontario an action can be maintained here to have a mortgagee of foreign land declared a trustee for the debtor of the moneys secured by the mortgage: *Pavey v. Davidson*, 16 C. L. T. 41.

In order to found an action in this country for a wrong committed abroad two conditions are necessary. First, the act complained of must be of such a character as to be actionable if committed in this country; and, secondly, it must be without justification by the law of the place where it was committed. Tort committed abroad.

The seizure by a British naval officer of British goods on a British ship in the territorial waters of a foreign sovereign, effected under the authority and by the direction of that sovereign, cannot be made the subject of legal proceedings in this country: *Carr v. Francis Times & Co.*, 71 L. J. K. B. 361; (1902), A. C. 176; 85 L. T. 114; 50 W. R. 257.

HISTORIES.

A general history may be given in evidence to prove a matter relating to the kingdom in general. B. N. P. 248. Historical evidence of this kind is only to be used in proof of a matter concerning the Government: *Cockman v. Mather*, 1 Barn. 14. It seems indeed only to be used to refresh the memory of the jury on notorious facts which require no evidence at all. Thus it has been held that counsel may in addressing a jury refer generally to matters of history, whether ecclesiastical or political, and cite the language of writers or statesmen by way of illustration or explanation; but they are not at liberty to cite specific canons or foreign treaties or the printed works in use among certain communities, and purporting to represent their doctrines so as to fix a party to the suit with those doctrines, and to persuade the jury to act upon such imputation, unless such documents be proved by regular evidence and brought home to the party by proof of his personal adoption of them: *Darby v. Ouseley*, 1 H. & N. 1.

IDENTITY.

A description in a chattel mortgage of after acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishings.

furniture and fixtures, and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business" is sufficient and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage: *Horsfell v. Boissacq*, 21 A. R. 663.

Description of goods mortgaged—N. W. Ter. Ord. No. 5, of 1881. Section 6 of the Ordinance provides: "All the instruments mentioned in this Ordinance, whether for the mortgage or sale of goods and the same may be readily and easily known and distinguished," chattels, shall contain such sufficient and full description thereof that The description in a chattel mortgage was: "All and singular the goods, chattels, stock-in-trade, fixtures and store buildings of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise, now being in the store of said mortgagors on the north half of section 6, township 19, range 28, west of the 4th principal meridian." Held, that the description was sufficient: *McCall v. Wolff* (13 Can. S. C. R. 130), distinguished: *Hovey v. Whiting* (14 Can. S. C. R. 515), followed: *Thomson v. Quirk*, 18 S. C. R. 695. In a chattel mortgage the goods were described as "all and singular the goods, chattels, furniture and household stuff hereinafter particularly mentioned and described in the schedule hereunto annexed, A., all of which goods and chattels are now situate" (description of the premises), without stating that such goods were all the goods on such premises: Held, that the description of the goods was not a full and sufficient description within the meaning of C. M. S., c. 49, s. 5, and the mortgage was void against execution creditors: *McCall v. Wolff*, 13 S. C. R. 130. Parol evidence to explain: *Melady v. Michaud*, Q. R. 31 S. C. 1. Proof of identity of chattel: See *Stevens v. Barfoot*, 9 O. R. 692; 13 A. R. 366. Plaintiff claimed a cow under a bill of sale from one M., by which M. conveyed to the plaintiff "one red cow, four years old, valued at \$21":—Held, that the description was insufficient to pass the property in the cow as it did not in any way distinguish the cow so that she could be identified: *Hughan v. McCollum*, 20 N. S. R. (8 R. & G.) 202; 8 C. L. T. 381 (N.S.). The mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description: *Lazarus v. Andrade*, 5 C. P. D., followed; *Imperial Brewers Limited v. Gelin*, 18 Man. L. R. 283, 9 W. L. R. 99. The test to be applied is that laid down in *Luckin v. Hamlyn* (21 L. T. 366), where it is said: "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is that such a description should be given that if inquiry be made in the place

where the person resides he may be easily identified: *Vererson v. Seymour*, 97 L. T. 788.

Where in a grant or devise the description of parcels is made up of more than one, and one part is true and the other false, then if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as *falsa demonstratio* and will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true, and the latter untrue, it being immaterial in what part of the description the *demonstratio* occurs: *Cowan v. Truefitt* (1899), 2 Ch. 309. Where in the operative part of a deed general words follow enumeration of particular things, these words are *prima facie* to be considered as having their natural and larger meaning, and are not to be restricted to things *ejusdem generis* with those enumerated unless there is something which shews the intention so to restrict them: *Anderson v. Anderson*, C. A. (1895), 1 Q. B. 749. Where land was described in a deed as consisting of certain lots, excepting thereout certain portions, and it was objected that the deed was void for uncertainty, the excepted portions not being sufficiently described:—Held, that evidence was properly admitted to shew what these portions were: *Lloyd v. Henderson*, 25 U. C. C. P. 253. Where land is so described by its local abutments as to enable any one to find it with certainty, it is unnecessary to state further in what lot in the township the land lies. If, therefore, the land so described is stated to be part of lot 42, when it is in reality part of lot 45, the deed is nevertheless certain and good: *Doe d. Notman v. McDonald*, 5 U. C. R. 321.

If a conveyance contains an adequate and sufficient definition with convenient certainty of what was intended to pass by it any erroneous statement as to dimensions or quantity, or any inaccuracy in the plan, will not vitiate the description or have any effect: *Thompson v. Hickman*, 76 L. J. Ch. 254; (1907) 1 Ch. 550; 96 L. T. 454; 23 T. L. R. 244.

It is not sufficient proof of the identity of a party served out of the jurisdiction that the deponent to the affidavit of service swears that he served "the above named defendant." The affidavit should shew the means of knowledge: *Armour v. Robertson*, 1 Ch. Ch. 252. Where there is nothing to raise a doubt as to the identity of the persons through whom a title comes it will be presumed from the identity of the names: *Nicholson v. Burkholder*, 21 U. C. R. 108. There was no proof of identity of the different grantors and grantees in the deeds shewing the chain of title except the similarity of names, and the possession of the patent and deeds:—Held, clearly sufficient: *Gallivan v. O'Donnell*, 36 U. C. R. 250. The admission of a person served with an office copy of the bill that he was the proper party named in a bill is not sufficient proof of the identity of the person

served with the defendant: *Stilson v. Kennedy*, 1 Ch. Ch. 236, 237 note. In an action by the indorsee of a promissory note against the maker, the handwriting of the attesting witness to the maker's signature, together with the handwriting of the indorser, were proved, but no evidence was given to identify the defendant with the person named in the note, and the Judge at the trial for want of such evidence nonsuited the plaintiff on motion for a new trial:—Held, that the evidence given at the trial was sufficient, and accordingly a new trial was granted: *McCullough v. Shields*, 3 Kerr 391 (N.B.).

INDICTMENT.

In an action for money had and received:—Held, that an indictment upon which the defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible as proof of that fact: *Macdonald v. Ketchum*, 7 U. C. C. P. 484.

INQUISITIONS.

When the return to an inquisition is given in evidence it is in general necessary to shew that the enquiry was made under proper authority. Inquisitions taken *ex officio* by officers acting under a general commission or appointment as escheators, etc., seem to be admissible on principle without further evidence of authority than that they were acting as such officers. Although an inquisition taken before a coroner *super visum corporis* was formerly considered conclusive evidence of the fact found by it against the executors or administrators of the deceased, it is now held that everything done under it is traversable: *Garnett v. Ferrand*, 6 B. & C. 611. An inquisition finding lunacy is evidence of it against third persons though not conclusive: *Frank v. Frank*, 2 M. & R. 314. An inquisition by a sheriff's jury to ascertain the value of property for the information of the sheriff is not admissible evidence of property, even against the sheriff: *Latkow v. Eamer*, 2 H. B. C. 437; nor is it evidence in his favour: *Glossop v. Pole*, 3 M. & S. 175.

JUDGMENTS.

The judgment of a Court of concurrent jurisdiction directly upon a point is, as a defence, a bar, and as evidence conclusive upon the same matter between the same parties, but it is also a general principle that a transaction between two parties in a judicial proceeding ought not to bind a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Therefore the depositions of witnesses in another

cause in proof of a fact; the verdict of a jury finding the fact; and the judgment of the Court on facts so found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. A judgment is conclusive (i.e., an estoppel) if pleaded, where there is an opportunity of pleading it; but where there is no such opportunity, then it is conclusive as evidence; but if the party forbears to rely upon an estoppel when he may plead it, he is taken to waive the estoppel and to leave the prior judgment as evidence only for the jury. Where the actual grounds of the judgment can be clearly discovered from the judgment itself it is conclusive as to the grounds as well as with reference to the actual matter decided: *Alison's Case*, L. R. 9 Ch. 1, 25. The proceedings of a Court of record can be proved only by the record thereof; the record may be made up at any time when it becomes necessary to put it in evidence: *Kemp v. Neville*, 10 C. B. N. S. 523. Judgments may be proved at *nisi prius* by producing the original roll, as well as by exemplification; but the clerk should not produce such roll without proper authority: *Paterson v. Todd*, 24 U. C. R. 296; *Sloan v. Whalen*, 15 U. C. C. P. 319. In order to bind a party he must have sued or been sued in the same character in both suits. In considering the effect of judgments the Court will look to the real and not only to the nominal parties to the suit: *Kennerley v. Orpe*, 2 Doug. 517. Where a party could not have been prejudiced by a verdict if it had gone against him, a verdict in his favor in the former action will not be available as evidence for him even against one who was a party to it: *Wenman v. McKenzie*, 5 E. & B. 447.

There are several exceptions to the general rule that no one shall be bound or prejudiced by judgments to which he is not party or privy. They are admissible where they relate to public matters, thus, a public right of way: *Reed v. Jackson*, 1 East. 355. Where the judgment is produced merely for the purpose of proving the fact of such recovery of judgment, and not with a view to proof of the truth of the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus a verdict against a master in an action for the negligence of his servant is evidence in an action by the master against the servant to prove the amount of damages though not of the fact of the injury: *Greene v. New River Co.*, 4 T. R. 590. A judgment between the same parties and upon the same cause of action is conclusive, although the form of action is different. Thus a verdict in trover was a bar in an action for money had and received, brought for the value of the same goods: *Hitchin v. Campbell*, 2 W. Bl. 827. It is a general rule that a judgment is only evidence where it is direct upon the point which it is offered in evidence to prove. It has been denied to be evidence of any matter which came collaterally in question, or of any matter incidentally

strangers,
when
bound.

Collateral
issues.

*Res
judicata.*

cognizable, or of any matter to be inferred by argument from the judgment. Any fact on which the judgment of the Court must have been based cannot be considered as merely collateral: *R. v. Hartington*, 4 E. & B. 780. There are various legal proceedings not being suits *inter partes* merely which bind all mankind until set aside in due course. The most remarkable examples occur in proceedings brought on the revenue side of the Court of Exchequer *in rem*, by revenue officers; in the Courts of Admiralty, in the Courts for Probate and Divorce, and in the Spiritual Courts. A judgment *in rem* of a competent foreign tribunal is conclusive, and cannot, in the absence of fraud, be questioned in our Courts: *Castrique v. Imrie*, 8 C. B. N. S. 405. The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy: *Dingwall v. McBean*, 30 S. C. R. 441. An exception based upon *res judicata* is well founded when the plaintiff sued for the same relief, for the same cause, in a new action against the same defendant as principal, after the dismissal of a former action against him as surety: *Sutherland v. Lafontaine*, Q. R. 31 S. C. 431.

Judgments of Admiralty Courts. Upon questions of prize the Court of Admiralty has exclusive jurisdiction; therefore a sentence of condemnation in that Court is conclusive, and being a proceeding *in rem* it binds all the world. The sentence of a foreign Court of Admiralty is also, by the comity of nations, held to be conclusive upon the same question arising in this country: *Bolton v. Gladstone*, 5 East 155; but the sentence of a Court of Admiralty, sitting in contravention of the law of nations, will not be recognized in our Courts: *Havlock v. Rockwood*, 8 T. R. 268. Where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the Courts here may examine the grounds on which it proceeded: *Lothian v. Henderson*, 3 B. & P. 499. It is the rule of the Admiralty as it is of all other Courts, that a party can only recover *secundum allegata et probata*: *The Alma*, 1 Old. 789 (N.S.).

Judgments of Foreign Courts. All judgments are foreign judgments which are given by Courts whose jurisdiction does not extend to the territories governed by our laws: *McFarlane v. Derbyshire*, 8 U. C. R. 12. A foreign judgment is *prima facie* a debt, and conclusive on its merits, and as such is assignable under 35 Vict. c. 12 (O.), so as to enable the assignee to sue thereon, in his own name: *Fowler v. Vail*, 27 U. C. C. P. 417. An action will not lie upon a decree or judgment of a foreign Court which is not final in its nature, but merely to do some act, as to save a party harmless and indemnified: *Gauthier v. Routh*, 6 O. S. 602. This action was

brought to recover the amount of a judgment of an Ontario Court against the defendants in respect of notes given for an engine. These notes contained a provision that, in case of default, the makers, who were residents of Manitoba, might be sued in Ontario upon them. Quere, whether such a consent to the jurisdiction of a foreign Court would not be recognized by international as well as by municipal law: *Copin v. Adamson*, L. R. 9 Ex. 345. As, however, the defendants succeeded upon a defence to the original cause of action, which they were entitled to raise in this action, on the authority of *Hickey v. Legresley*, 15 Man. L. R. 304, it became unnecessary to decide this question: *New Hamburg Manufacturing Co. v. Shields*, 16 Man. L. R. 212. A foreign judgment is not a merger of the original cause of action, which may, notwithstanding such judgment, be sued on in this Province: *Trenchard v. Upton*, 26 O. R. 430.

The judgment of a foreign Court of competent jurisdiction deciding a question cognizable by the law of the country is conclusive ^{When con-} here if the same question arise incidentally between the same parties, ^{clusive.} and the sentence be conclusive by the law of the foreign country: 2 Smith's L. C., 8th ed., §39. In an action brought in this country upon the judgment of a foreign Court having jurisdiction over the parties and subject matter of the suit, such judgment must now be taken as conclusive and binding on both parties so as to preclude their contesting the merits or propriety of the decision: *Australasia, When not* ^{binding.} *Bank of, v. Nias*, 16 Q. B. 717. But if it appears on the face of the foreign proceedings, or by extrinsic proof, that the judgment is against natural justice, as that the defendant has never been summoned (in which cases the Court could have no jurisdiction), the Courts here will not give effect to it: *Cavan v. Stewart*, 1 Stark 525. So, where the judgment has been obtained by fraud: *Aboulloff v. Oppenheimer*, 10 Q. B. D. 295. So, where the Judges in the foreign Court were interested parties: *Price v. Dewhurst*, 8 Sim. 279. In order to render the judgment binding in this country it must appear that it was final and conclusive in the foreign Court in which it was given: *Plummer v. Woodburn*, 4 B. & C. 625; that the cause of action was exactly the same: *Callander v. Dittreich*, 4 M. & G. 68; and that the parties were within or subject to its jurisdiction: *Novelli v. Rossi*, 2 R. & Ad. 757. The judgment to be conclusive must be on the merits: *The Delta*, 1 P. D. 393. Thus a foreign judgment in favour of the defendant on the foreign Statute of Limitations is no bar to an action here where the statute only bars the remedy and not the right: *Harris v. Quin*, L. R. 4 Q. B. 653. Where the foreign Court acts in defiance of the comity of nations by refusing to recognize a title properly acquired according to the laws of England, our Courts will not give effect to its decision: *Simpson v. Fogo*, 1 J. & H. 18. The mere pendency of a suit in a foreign Court is no

bar to a suit in this country for the same cause: *Ostell v. Lepage*, 5 De G. & Sm. 95.

Proof.

A judgment duly verified by a seal proved to be that of the foreign Court was presumed to be regular and agreeable to the foreign law until the contrary is shewn: *Alivon v. Furnival*, 1 C. M. & Rob. 277. It is sufficient that the seal affixed to a foreign judgment is the seal used by the foreign Court, though it purports on its face to be the seal of a different Court from that in which the judgment was obtained: *Cyr v. Sanjacon*, 2 All. 641 (N.B.). A foreign judgment is not a debt of record, but only evidence of a debt, and the simple contract on which it is founded is not merged in it: *Mergus v. Wardlaw*, 3 Kerr 665 (N.B.). Though interest cannot be recovered on a foreign judgment as incident thereto, the jury may allow interest as damages, but not more than six years' arrears: *Bank of Montreal v. Cornish*, T. W. 272 M. L. R. (Man.). The mere exemplification of a foreign judgment if properly proved to be under the seal of the Court, is sufficient proof: *Warener v. Kingsmill*, 7 U. C. R. 409. Debt on a judgment rendered in an inferior Court in the United States. It was proved that the Court had no seal, and the Judge's book was produced containing the judgment and his handwriting and signature proved:—Held, sufficient: *Kerby v. Elliott*, 12 U. C. R. 367. Plaintiff produced as evidence of a judgment against defendant in the Court of the Exchequer of Pleas in England, a certified copy thereof under the hand of one of the masters of that Court:—Held, insufficient; and that the plaintiff should at least have produced an exemplification under the seal of the Court: *Hesketh v. Ward*, 17 U. C. C. P. 190.

If a judgment is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, the English Courts will not investigate the propriety of the proceedings against English views of substantial justice. The jurisdiction which alone is important in such a matter is the competence of the Court of an international sense—that is, its territorial competence over the subject matter and over the defendant.

Error in procedure. Accordingly the judgment of such a Court cannot be impeached in English Courts for a mere error of procedure, even by third parties in collateral proceedings, although such error, if it occurred, was such as to make the judgment of the foreign Court void by the law of the country where it was pronounced. Such a matter ought not to be enquired into by the English Courts. The principles laid down in *Vanquelin v. Bouard* (33 L. J. C. P. 78; 15 C. B. (N.S.) 341); *Castrique v. Imrie* (39 L. J. C. P. 350; L. R. 4 H. L. 414); and *Dogliani v. Crispin* (35 L. J. P. & M. 129; L. R. 1 H. L. 301), applied. *Pemberton v. Hughes*, 68 L. J. Ch. 281; (1899), 1 Ch. 781; 80 L. T. 669; 47 W. R. 354.

In an action founded upon a foreign judgment the defendant is at liberty to plead and to prove, if he can, that the judgment was recovered by fraud and deception practised upon the Court: *Fraud. Codd v. Delap*, 92 L. T. 510, followed. There is no conflict between the above decision and the judgment of the Court of Appeal in *Woodruff v. McLennan*, 14 A. R. 242.

The defences that may be set up in an action in Manitoba on a foreign judgment by virtue of s.s. 1 of s. 38 of the King's Bench Act, R. S. M. 1902, c. 40, are not limited to such as might have been, but were not, pleaded in the original action, but include such as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay; and a motion to strike out defences was refused. *Gault v. McNabb*, 1 Man. L. R. 35, distinguished. *Meyers v. Prittie*, 1 Man. L. R. 27, not followed. *British Linen Co. v. McEwan*, 8 Man. L. R. 99, discussed: *Hickey v. Legresley*, 15 Man. L. R. 304, 1 W. L. R. 546.

Judgment and satisfaction thereof in a foreign country on a cause of action is a bar to any further action in England on the same cause of action: *Taylor v. Holland*, 71 L. J. K. B. 278; (1902), 1 K. B. 676; 86 L. T. 288; 50 W. R. 558.

The Ontario Evidence Act provides as follows:—*

32. A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any Court of Record in England or Ireland or in any of the Superior Courts of Law, Equity or Bankruptcy in Scotland, or in any Court of Record in Canada or in any of the Provinces or Territories in Canada, or in any British Colony or possession, or in any Court of Record of the United States or of any State of the United States of America, may be proved by an exemplification of the same under the seal of the Court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree, or other judicial proceeding of the High Court in Ontario may be proved by an exemplification thereof.

Judgments in Inferior Courts may be proved by production of the book containing the proceedings of the Court from the proper custody, and if not made up in form the minutes of the proceedings will be evidence, or an examined copy of them: *Dawson v. Gregory*, 7 Q. B. 756. The Court of quarterly sessions on the Crown side is

* Compare

R. S. B. C., c. 71, s. 12.

R. S. Man., c. 57, s. 12.

R. S. N. B., c. 127, s. 58.

R. S. N. S., c. 163, s. 16.

a Court of Oyer and Terminer, and is not an inferior Court: *R. v. Smith*, 8 B. & C. 341.

The Ontario Evidence Act provides as follows:—

Proving title under Division Court execution.

37. In proving a title under a Sheriff's conveyance based upon an execution issued from a Division Court it shall be sufficient to prove the judgment recovered in the Division Court without proof of any prior proceedings.

The final judgment of a competent inferior Court, whether of record or not, acting within its jurisdiction, will be conclusive between the same parties upon the same subject matter where properly relied on: *Routledge v. Hislop*, 2 E. & E. 549. In order to be a bar, the proceedings in a Court of limited jurisdiction must show on the face of them expressly or by necessary intendment that the Court had jurisdiction in the matter: *Taylor v. Clemson*, 11 Cl. & F. 610. A judgment in an inferior Court, for a specific sum, is *prima facie* evidence in a superior Court against a less sum only being due, and as respects the merits, it is conclusive till repelled by proof sufficient to destroy the effect of a foreign judgment as evidence of a debt: *Page v. Phelan*, 1 U. C. R. 254.

LAND TITLES INSTRUMENTS.

See REGISTERED INSTRUMENTS, *post* PAGE 92.

LETTERS.

The Court will restrain any person in the possession of letters from publishing them against the will of the writer, except under special circumstances, *e.g.*, where the publication is necessary for the purpose of clearing the defendant's character; that there was nothing in the plaintiff's conduct to disentitle him to this relief and the defendant had not shewn that his purpose in publishing the letters was to clear his own character: *Labouchere v. Hess*, 77 L. T. 559. The recipient or possessor of letters is not entitled to publish them, nor paraphrases thereof, nor extracts therefrom, and if they are written in confidence, he is not entitled to communicate their contents to third persons. But, subject to these exceptions, the lawful possession of a letter confers all the rights incident to property.

Accordingly, a person lawfully in possession of letters may make use of the information contained in them for the purpose of writing a biography without any express or implied authority from the writer.

The right to use a letter does not depend upon the intention of the writer.

A person who has lawfully obtained possession of letters will not be restrained from using them merely because the addressee has been guilty of a breach of confidence in parting with them. Confidence does not run with the letters.

The observations of Lord Eldon in *Gee v. Pritchard* (2 Swanst. 402, at p. 416), apply to letters as well as to books.

Philip v. Pennell, 76 L. J. (Ch. 663; (1907), 2 Ch. 577; 97 L. T. 386; 23 T. L. R. 718.

Letters written by a testator to his relatives before making his will, stating his intention to leave his property to them, are not admissible in evidence to defeat a will in favour of other persons, in an action attacking the will on the ground of want of mental capacity. *Doe dem. Levi v. Samuel*, 12 N. B. R. 265. The defendant wrongfully communicated to another person a letter which had been written by a third person to the plaintiff and which had got into the defendant's possession, and the plaintiff brought an action to recover damages for the detention and conversion of the letter:—Held, that the plaintiff could recover substantial damages and not merely the value of the thing converted: *Thurston v. Charles*, 21 T. L. R. 659.

MAPS, *See* PLANS *below*.

NOTARIAL DOCUMENTS.

The Ontario Evidence Act provides as follows:—*

33. A copy of a notarial act or instrument in writing made in Quebec, before a notary, and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his possession as such notary or prothonotary, shall be receivable in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved.

34. The proof by such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary.

A notarial certificate of the protest abroad of a foreign bill of exchange is evidence of that fact: *Geralopulo v. Wieler*, 10 C. B. 690. So, a certificate which purported to be given by a notary public

* Compare

R. S. B. C., c. 71, s. 19.

R. S. Man., c. 57, s. 15.

R. S. N. B., c. 127, s. 49.

R. S. N. S., c. 127, s. 27.

verifying the signature of a person abroad before whom an affidavit is sworn, and stating that that person is competent to administer oaths, is evidence of these facts: *Cole v. Sherard*, 11 Exch. 482. In other cases notarial and consular certificates are not evidence of the facts certified: *Chesmer v. Noyes*, 4 Camp. 129. A certificate of ordination under the seal of the bishop is evidence of holy orders: *R. v. Bathwick*, 2 B. & Ad. 639.

As to protests of bills and notes the Ontario Evidence Act provides:—*

Produc-
tion of pro-
test to be
prima facie
evidence
that pro-
test was
made.

Certain
certificates
of notaries
public
prima facie
evid-
ence.

35. A protest of a bill of exchange or promissory note purporting to be under the hand of a notary public, wherever made, shall be received as *prima facie* evidence of the allegations and facts therein stated.

36. Any note, memorandum or certificate purporting to be made by a notary public in Canada, in his own handwriting, or to be signed by him at the foot of or embodied in any protest, or in a regular register of official acts purporting to be kept by him, shall be *prima facie* evidence of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or delivered, at the time and in the manner stated in such note, certificate or memorandum.

PATENTS FOR LAND GRANTS.

The description of a lot by metes and bounds from the Crown Lands Department is admissible in evidence to explain the patent for the lot in which it is described only by the number and concession: *Hagarty v. Britton*, 30 U. C. R. 321. In construing a patent, reference may be had to papers in the Crown lands office connected with the application for the patent: *Brady v. Sadler*, 13 O. R. 692; see *S. C.*, 16 O. R. 49; 17 A. R. 365. The description of a lot prepared for and used by the Crown lands department in framing the patent which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot. The plan of survey of record in and adopted by the Crown lands department governs on a question of location of a road when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground: *Kenny v. Caldwell*, 21 A. R. 110; 24 S. C. R. 699. In actions in which the King is a party, in the construction of grants from the Crown where there is an ambiguity in

* Compare

R. S. B. C., none.

R. S. N. B., none.

R. S. Man., c. 57, ss. 28, 30 and 29.

R. S. N. S., c. 163, ss. 28 and 29.

respect of the premises, as, for instance, what is to be considered the bank of a river, other grants from the Crown are admissible to assist in the construction: *Clark v. Bonnycastle*, 3 O. S. 528. A person who has lost his patent for land will not be allowed to give parol evidence of its contents; he must produce an exemplification of the patent: *McCullum v. Davis*, 8 U. C. R. 150. The grantee of a water lot bounded on the shore is entitled to take up to high water mark, and that line of his grant changes with the gradual encroachment or retirement of the sea: *Eason v. Mayberry*, 1 Thom. (last ed.) 144; (2nd ed.) 186. A grant of land bounded by navigable waters does not extend to *medium filum* as in the case of non-navigable streams: *Berthel v. Scotten*, 24 S. C. R. 367.

PHOTOGRAPHS.

The use and admissibility of photographs as evidence of written documents considered: *McCullough v. Munn* (1908), 2 Ir. R. 194—C. A.

PLANS AND MAPS.

The defendants tendered two plans in evidence which came from the Crown lands office, which the witness who produced them stated had been there for at least thirty years, but neither their origin nor history was given; nor was it shewn that they had been regarded in that office as authentic:—Held, that the Judge did right in rejecting them: *Walker et al. v. Bayers*, 3 N. S. D. 270 (N. S.). On an indictment for the non-repair of a bridge the Court admitted in evidence an ancient map purporting to have been made by one C., a person of repute in connection with maps and surveys, proof being given of the custody from which it came. Semble, the map would have been admissible, even without proof of the custody from which it came: *Re v. Norfolk County Council*, 23 T. L. R. 259. A plan was produced from the registry office sworn to be that furnished by the Commissioner of Crown lands. It was headed "Cardiff" (the name of the township), and at the bottom was written "Department of Crown Lands, Ottawa, November, 1866, A. Russell, Assistant Commissioner," whose signature was proved: Held, sufficiently certified and receivable in evidence: *Nicholson v. Page*, 27 U. C. R. 318. A map produced from the custody of the son of the original owner of the lot, and sworn to be the map upon which the township was originally sold: Held, to be properly admitted in evidence: *Van Every v. Drake*, 9 U. C. C. P. 478. Certain maps of the City of Toronto, made by city surveyors in 1857 and 1858, showing thereon a square marked "Bellevue Square," were offered in evidence to show the boundaries of the square. It was shewn that

the defendant knew of these maps but they were not prepared under his instructions: Held, that the maps could not be received in evidence to show the boundaries of the square: *Van Koughnet v. Denison*, 11 A. R. 699. *Semble*, that an admitted copy of the field notes from the Crown lands officer may be received in evidence: *Strong v. Jones*, 7 U. C. R. 385. Where it appeared that in directing the jury at the trial the Judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan, upon which the original grants of the lands in dispute depended, and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff, and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of:—Held, that, in the absence of evidence of error, the older grants and plan must govern the rights of the parties: *Bartlett v. Nova Scotia Steel Co.*, 38 S. C. R. 336.

POST MARK.

The post mark on a letter is usually taken as genuine without proof. But if disputed it has been doubted whether the person who made it must be called, or whether it may be proved by any postmaster or by any one in the habit of receiving letters through the same post office: *Woodcock v. Houldsworth*, 16 M. & W. 124. Probably it may be verified in any of these ways, but the person who stamped the letter is not likely to recollect that he did so, or to be better qualified to speak of it than any one who happens to be acquainted with the particular post office mark. As to the presumption of the receipt of a letter duly posted: see *Shannon v. Hastings Mutual Insurance Co.*, 2 A. R. 81, 2 S. C. R. 394. The post mark on a letter has been admitted as evidence of the date of its being sent: *Abbey v. Lill*, 5 Bing. 299; but a post mark may be contradicted by oral evidence of the real date of posting: *Stocken v. Collin*, 7 M. & W. 515. The post mark is no proof of a publication of the contents of the letter at the place of posting: *R. v. Watson*, 1 Camp. 215. A foreign post mark on a letter is *prima facie* evidence of the time when the letter was posted: *O'Neill v. Perrin*, M. T. 3 Vict.

POWERS.

As a general rule all the circumstances required by the creator of a power, however otherwise unimportant, must be observed, and cannot be satisfied but by a strict and literal performance: *Hawkins v. Kemp*, 3 East. 440; and when the power directs attestation and other formalities the attestation must notice the compliance with the formalities: *Mansfield v. Peach*, 2 M. & S. 576. A subsequent correct attestation indorsed upon the instrument after the death of one of

the parties would not remedy the defect: *Wright v. Wakeford*, 2 Taunt. 214. It is doubtful whether if the attestation is deficient the deficiency cannot be supplied by evidence *aliunde* that the formalities were all gone through. When the instrument creating the power does not require attestation, an informal or imperfect one will not invalidate. The Wills Act, Ont. Stats. 1910, c. 57, abrogates the necessity of following the formalities prescribed by the donor of a power to be exercised by a will or appointment in the nature of a will. The execution of wills in virtue of powers must conform to the requirements of section 13 of the Act.* Under section 18 of R. S. O. 1897 c. 119, a deed executed in the presence of and attested by two or more witnesses in the ordinary manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or instrument in writing, not testamentary, although some other execution, attestation, or solemnity may have been prescribed by the donor; provided that this shall not dispense with any requirement prescribed by him other than the manner of execution or attestation, nor prevent the donee from executing the power in the manner prescribed by the donor. A will under a power must conform to the provisions of the Wills Act. An appointment under R. S. O. 1897, c. 128, may be executed either according to that Act, or in the manner prescribed by the donor of the power. The Courts will in a proper case aid, as a defective appointment, an appointment made by will instead of by deed: *Tollett v. Tollett*, 2 P. Wms. 489; *Bruce v. Bruce*, 11 Eq. 371; *Shore v. Shore*, 21 C. R. 54.

Mode of
executing
powers.

PRIVATE DEEDS AND WRITINGS.

Whether the document was a deed or not as being under seal, considered—cases cited: *Sawyer and Massey, Limited v. Bouchard*, 13 W. L. R. 394.

Where an indenture is in two parts, each party executing each part, if there is a material variation between the two parts the indenture is void for want of mutuality: *Wynne's Case*, L. R. 8 Ch. 1002.

The erasure of the date is not to be presumed to have been made after execution, but even if it were the deed takes effect from its delivery: *Fraser v. Fraser*, 14 U. C. C. P. 70. A promise to deliver

* Compare

R. S. B. C., c. 193, s. 8.

R. S. Man., c. 174, s. 7.

R. S. N. B., c. 160, s. 5.

R. S. N. S., c. 139, s. 8.

conveyance includes a promise to execute it: *Whittier v. McLennan*, 13 U. C. R. 638. *Seemle*, that an impression upon the paper without wax or any extraneous substance is a sufficient seal: *Foster v. Geddes*, 14 U. C. R. 239. Signing is not essential to a deed, but should never be dispensed with: *Judge v. Thomson*, 20 U. C. R. 523.

Whenever a deed or other instrument to which attestation is essential is subscribed by attesting witnesses, one of them at least must be called to prove the execution. By the Ontario Evidence Act, 1909, section 51, it is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not essential. If proof has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed and against whom it is sought to be used into the witness box, and extracting an admission of the execution from him: *Whyman v. Gart*, 8 Exch. 803. Where the attesting witness is dead or insane or infamous, or absent in a foreign country, or not amenable to the process of the Superior Courts, or where he cannot be found after diligent enquiry (*Cunliffe v. Sefton*, 2 East 183), evidence of the witness's handwriting has always been admissible. It is not sufficient ground for admitting evidence of the witness's handwriting that he is unable to attend from illness, and lies without hope of recovery: *Harrison v. Blades*, 3 Camp. 457. The party interested in his testimony must in such a case get a Judge's order to examine him out of Court. The sufficiency of the enquiry is for the determination of the Judge, who will found his opinion on the nature and circumstances of each case. When the Court is satisfied that due diligence has been used to find the witness then it is sufficient to prove his handwriting without proving the handwriting of the party unless with a view to establish his identity: *Nelson v. Whittall*, 1 B. & A. 19. Where the name of a fictitious person is inserted as witness: *Fassett v. Brown*, Peake, 23; or where the subscribing witness denies any knowledge of the execution: *Talbot v. Hodgson*, 7 Taunt. 251; or gives evidence that the document was not duly executed: *Bozman v. Hodgson*, L. R. 1 P. & M. 362; or where the attesting witness subscribes his name without the knowledge or consent of the party: *McCraw v. Gentry*, 3 Camp. 322—in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the person executing it or who was present at the time of execution or by the admission of the party. Where there are two attesting witnesses and one of them is incompetent, or his evidence cannot be obtained, the other witness

* Compare

R. S. B. C., c. 71, s. 44.

R. S. Man., none.

R. S. N. B., c. 127, s. 19.

R. S. N. S., c. 163, s. 32.

must be called and evidence of the handwriting of the absent witness will not be sufficient: *Cunliffe v. Sefton*, 2 East 183. Where attestation is necessary to the validity of a writing the form and nature of it must depend on the provision of the law or other authority which made it necessary. Unless it be otherwise provided, in attesting a deed it is not necessary that the witness should see the party sign or seal. If he sees him deliver it already signed and sealed, or sealed only, where signature is unnecessary, it will be sufficient. It is not necessary for the attesting witness to be able to say whether certain blanks in the deed were filled up at the time of execution, for this will be presumed; and the witness generally sees nothing but the delivery: *Tatum v. Catomore*, 16 Q. B. 745. The fact that a deed after it has been signed and sealed by the grantor is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument. The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately, the grantor retained the possession and enjoyment of it until death: *Zwicker v. Zwicker*, 29 S. C. R. 527. A deed is presumed to have been delivered on the day it bears date: *Hayward v. Thacker*, 31 U. C. R. 427. That a document not in existence was written by a particular individual may be proved by a person who had had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed, and could only say that from his recollection of the document it was written by the same person. In an action for a written libel, the defendant was asked on cross-examination if he had not changed his signature since the action began, which he denied:—Held, that documentary evidence was admissible to shew that the signature had been changed: *Alexander v. Vye*, 16 S. C. R. 501. Delivery of deed gives constructive possession. Actual delivery is not necessary in Nova Scotia. Where there is no adverse possession against the vendor at time of sale, the delivery of the deed carries with it constructive possession of the land to the purchaser: *Simpson v. Foote*, 2 Thom. 240 (N. S.). The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners (34 N. S. Rep. 453 affirmed): *Oland v. McNeill*, 32 S. C. R. 23. All the witnesses must be accounted for, though the plaintiff is one of them and his handwriting proved: *McDonald v. Twigg*, 5 U. C. R. 167. Every reasonable inquiry must be made for the subscribing witness in the most likely place: *Tylden v. Bullen*, 3 U. C. R. 10. The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. The demandant who alleged

Document
not in
existence.

the release to be a forgery offered to prove a declaration by P. that he had left the country because he had forged the demandant's name: Held, following *Stobart v. Dryden*, 1 M. & W. 616, that such evidence was rightly rejected: *Rose v. Cuyler*, 27 U. C. R. 270. The subscribing witness to a deed need not be produced if the handwriting of the party making the instrument can be otherwise proved: *Woods v. Fraser*, 2 Thom. 184 (N. S.). For the purpose of proving the execution of deeds, a witness who was not the witness to the deeds went to the persons by whom the deeds purported to have been executed, who admitted to him that the signatures were theirs, and who wrote their names in the presence of the witness, who had no previous acquaintance with them or with their handwriting: Held, that evidence of these admissions, and of the belief of the witness from the knowledge of the handwriting thus acquired that the signatures to the deeds were genuine, was good evidence to go to a jury; and in the absence of any contradictory evidence, sufficient to warrant a finding that the deeds had been duly executed upon the respective days upon which they purported to have been executed: *Thompson v. Bennett*, 22 U. C. C. P. 393. Although one of two witnesses to an agreement may deny his signature, and a person well acquainted with the handwriting of the other may refuse to say that the signature is genuine, it may still be left to the jury to say under the circumstances of the case whether the agreement has not in fact been signed by the parties: *Baroer v. Armstrong*, 6 O. S. 543. In ejectment, the plaintiff proved a paper title, but the patent did not issue until 1826, and the deed from the patentee was executed in 1824. This deed was lost, and the memorial of it shewed it to have been an ordinary conveyance in fee, but not what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title: Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied: *Armstrong v. Little*, 20 U. C. R. 425. A defendant's counsel to get from a witness an opinion as to the handwriting of the plaintiff's receipt in full to the action, proposed to put into his hands other papers purporting to have been signed by the plaintiff, but in no way connected with the cause:—Held, that the learned Judge rightly refused to allow the witness to be examined as to the other writings, till he had first from his own recollection of the plaintiff's handwriting given an opinion upon the signature of the receipt: *Gleeson v. Wallace*, 4 U. C. R. 245. In proving the execution of a deed the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that seeing his own signature to it, he has no doubt that he saw it executed. This has always been received as sufficient proof of the execution: *R. v. S. Martin's Leicester*, 2 Ad. & E. 213.

Admission
by witness.

Know-
ing
witness.

The grantee under a deed is not competent to attest the execution thereof by the grantor: *Seal v. Claridge*, 7 Q. B. D. 517.

Some evidence of the identity of the party to the instrument must be given, though very slight evidence will be sufficient: *Whitlock v. Musgrove*, 1 C. R. & M. 511; unless the name is so common as to neutralize the inference of identity, or other facts appear to raise a doubt, identity of name is *prima facie* enough to charge the defendant: *Sewell v. Evans*, 4 Q. B. 626. The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledges an impression already made: *Bell v. Dunsterville*, 4 T. R. 313; but where a deed is executed under the authority of a power requiring it to be under the hands and seals of the parties, the parties must use separate seals. Where a party executes a deed with a blank in it, which is afterwards filled up with his assent in his presence, and he subsequently recognizes the deed as valid, the filling up of the blank will not void it: *Hudson v. Revett*, 5 Bing. 368. But generally, a deed executed in blank, and left to be filled up by another who has no authority under seal, is void: *Hibblewhite v. W'Morine*, 6 M. & W. 200. When a subscribing witness is dead proof of the handwriting of such witness is evidence of everything on the face of the paper which imports to be sealed by the party: *Adam v. Kerr*, 1 B. & P. 361. Where the party named has acted under the deed, it will be presumed as against him to have been executed by him, although the seal has no signature annexed: and an attestation for signature is not necessary to the execution of a deed unless it be under a power which requires it: *Cherry v. Heming*, 4 Exch. 631. In the delivery of a deed no particular form is necessary. In general an agent to deliver a deed must be authorized by deed: *Berkeley v. Hardy*, 8 D. & Ry. 102. A deed executed by a marksman may be proved by a person who has seen the party make his mark, and can speak as to its peculiarities: *George v. Surrey*, M. & M. 516. If the deed after sealing be tendered to the covenantee, and he expressly rejects it and refuses to take any benefit from it, the execution is incomplete: *Xenos v. Wickham*, L. R. 2 H. L. 206. A condition previously expressed though not introduced into the act of delivery, is sufficient to make it a delivery as an escrow: *Johnson v. Baker*, 4 R. & A. 441. Delivery as an escrow requires no express words, but may be inferred from circumstances: *Bowker v. Burdekin*, 11 M. & W. 128. Delivery to a third person is not essential to a delivery as an escrow: *Gudgen v. Besset* 6 E. & B. 986. Where notice was given to produce a deed in the defendant's possession, and the defendant at the trial refused to do so, the plaintiff was allowed to prove it by a copy without calling any attesting witness; and it was held that the defendant could not put the plaintiff to a strict proof by afterwards producing the attested original: *Edmonds v. Challis*, 7 C. B. 413.

Jackson v. Allen, 3 Stark. 71. If witnesses are dead and the execution by the party to the instrument is proved, it is questionable whether proof of the handwriting of the witnesses is in any case necessary; at all events, if the attesting witness can be identified with a deceased person, this will dispense with further proof of his handwriting, for the only object of such last mentioned proof is to establish his identity: *R. v. Giles*, 1 E. & B. 642.

When Proof of Execution Dispensed With.—Where a party producing a deed upon a notice claims a beneficial interest under it, it is not necessary for the party calling for the deed to prove the execution of it; for in such a case the defendant by claiming under it accredits it as against him, though not to the extent of estopping him: *Pearce v. Stopper*, 3 Taunt. 60. Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner: *Gordon v. Secretan*, 8 East 548; so, if the party producing it claim an interest in it, but an interest unconnected with the cause, as where the action is for commission for procuring an apprentice for the defendant, and the instrument produced is the deed of apprenticeship: *Rearden v. Minter*, 5 M. & G. 204. As the principle of the cases is that the party who claims an estate or interest under the instrument in his possession impliedly affirms its due execution, the rule is inapplicable to instruments that merely testify contracts under which no permanent interest passed: *Collins v. Bayntun*, 1 Q. B. 117. A deed may be given in evidence without proof of execution if its execution, or the handwriting of the witness, be one of the admissions in the cause, or admitted on the pleadings, or if the party be estopped to dispute it as by recital, etc., but the estoppel is confined to the part recited, and if the party wishes to prove more he must prove it in the usual way: *Gillett v. Abbott*, 7 Ad. & E. 783. Where a document inadmissible as evidence has been in part read at the instance of counsel, he cannot afterwards object to the admissibility of the whole of it: *Laybourn v. Crisp*, 4 M. & W. 320. Where a question arises as to the effect of two deeds relating to the same subject matter, both executed on the same day, it must be proved which was in fact executed first; but if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, then the Court will presume that the deeds were executed in such order as to give effect to that intention: *Gartside v. Silkstone*, 21 Ch. D. 761.

Inadmissible document partly read.

PROBATE AND LETTERS OF ADMINISTRATION.

See also WILLS OF LATE, post page 104.

Where the title to personal property under a will is in question, the original will cannot in general be read in evidence; but the

probate must be produced: *Pinney v. Hunt*, 6 Ch. D. 88. The probate is sealed with the seal of the Court, but the probate is not the only evidence of the will, for the probate itself, as also letters of administration *cum testamento*, are only certificates that the will has been proved, and other evidence of equal authority can always be obtained. If the probate is lost it is not the practice to grant secondary probate, but only an exemplification which will be evidence of the proving of the will: *Shepherd v. Shorthose*, 1 Stra. 412. Administration is proved by the production of the letters of administration, or of the certificate or exemplification thereof granted by the Surrogate Court: *B. N. P.*, 246. A probate granted by a competent Court is conclusive of the validity and contents of a will and the appointment of executors till it is revoked: *Melhuish v. Milton*, 3 Ch. D. 27. On this ground the payment of money to an executor, who has obtained a probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null: *Allan v. Dundas*, 3 T. R. 125; letters of administration are not evidence of any fact which is matter of inference and not of adjudication, as the intestate's death, for the grant assumes the fact of death: *Thompson v. Donaldson*, 3 Esp. 63. A probate is not primary evidence in cases of pedigree to prove descent: *Wyld v. Ormerod*, 1 M. & Rob. 266. Letters probate issued by the proper Surrogate Court are, notwithstanding the Devolution of Estates Act, only *prima facie* evidence as far as real estate is concerned of the testamentary capacity of the testator; and in an action asserting title to real estate under a will, the defendant is entitled to give evidence to shew want of testamentary capacity: *Sproule v. Watson*, 23 A. R. 692. Where a probate is used as evidence under C. S. U. C. c. 16, it is evidence of the testator's death as well as of the will: *Davis v. Van Norman*, 30 U. C. R. 437. In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of the will produced by them was the copy of the probate from the registry office with the affidavit of verification attached: Held, that this was not proper evidence of the will, no notice having been given under R. S. O. 1887, c. 61, s. 38 (1897, c. 73; s. 41): *Barber v. McKay*, 17 O. R. 562. The words "Her Majesty's possessions out of Upper Canada," used in 16 Vict. c. 19, s. 5 (C. S. U. C. c. 32, s. 11), include England:—Held, therefore, that the probate of a will executed there, under the seal of the prerogative court of Canterbury, was properly received in evidence: *Coltman v. Brown*, 16 U. C. R. 133. A will devising land in Upper Canada having been made in Lower Canada, where testatrix lived, and being duly proved and enrolled among the records of the Court of King's Bench, and copies thereof directed to be given to the parties legally entitled thereto:—Held, that an office copy of such

will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such: *Patullo v. Boyington*, 4 U. C. C. P. 125.

PROCLAMATIONS.

On an application to set aside a nonsuit in an action brought by the plaintiff for damages for injuries occasioned by the defendants' negligence while in their employment, the Court on the argument allowed the plaintiff on terms to give in evidence the proclamation bringing into force the Ontario Factories Act: *Dean v. Ontario Cotton Mills Co.*, 14 O. R. 119. The King's proclamation being an act of state of which all ought to take notice, is evidence to prove a fact of a public nature recited in it, viz., that certain outrages had been committed in different parts of certain counties: *R. v. Sutton*, 4 M. & S. 532. The *Gazette* is evidence of all acts of state published therein, as where it states that certain addresses have been presented to the King, it is evidence to prove that fact: *R. v. Holt*, 5 T. R. 436; but the *Gazette* is not evidence unless so made by statute of matters therein contained which have no reference to acts of state, as a grant by the King to a subject of a tract of land: *R. v. Holt*, 5 T. R. 443. The existence of a war between this country and another requires no proof: *R. v. De Berenger*, 3 M. & S. 67.

Sections 23 and 24 of the Ontario Evidence Act provide:—

Proclama-
tions, Or-
ders in
Council,
etc. of Gov-
ernment of
Canada
and of
Provincial
Govern-
ments, how
proved.

23. *Prima facie* evidence of a proclamation, order, regulation or appointment to office made or issued

- (a) By the Governor-General or the Governor-General in Council, or other Chief Executive Officer or Administrator of the Government of Canada, or
 - (b) By or under the authority of any Minister or Head of any Department of the Government of Canada or of a Provincial or Territorial Government in Canada, or
 - (c) By a Lieutenant-Governor or Lieutenant-Governor in Council or other Chief Executive Officer or Administrator of Ontario or of any other Province or Territory in Canada,
- may be given by the production of
- (a) A copy of the *Canada Gazette* or of the official Gazette for any Province or Territory purporting to contain a notice of such proclamation, order, regulation or appointment, or
 - (b) A copy of such proclamation, order, regulation or appointment purporting to be printed by the King's Printer or by the Government Printer for the Province or Territory, or
 - (c) A copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true

copy by such Minister or Head of a Department or by the Clerk or assistant or acting Clerk of the Executive Council or by the Head of any Department of the Government of Canada or of a Provincial or Territorial Government or by his Deputy or acting Deputy.

24. An order in writing purporting to be signed by the Secretary Orders of State of Canada, and to be written by command of the Governor-General, shall be received in evidence as the order of the Governor-General; and an order in writing purporting to be signed by the Provincial Secretary and to be written by command of the Lieutenant-Governor, shall be received in evidence as the order of the Lieutenant-Governor.*

25. Copies of proclamations and of official and other documents, Notices in notices and advertisements printed in the *Canada Gazette* or in the *Ontario Gazette* or in the official Gazette of any Province or Territory in Canada, shall be *prima facie* evidence of the originals and of the contents thereof.†

PROGRAMMES.

Objections to secondary evidence of the contents of written documents must be distinctly stated when it is offered; and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case. Each programme of an entertainment is an original document, not a mere copy; *Carte v. Dennis*, 5 Terr. L. R. 30.

PUBLIC BOOKS AND DOCUMENTS.

Whenever an original is of a public nature, and admissible in evidence as such, an examined copy is on grounds of public convenience also admissible: *Lynch v. Clerke*, 3 Salk. 154. Public books and documents of an official character are in many instances evidence even as between strangers of the facts therein recorded. Thus, where a duty is cast by common law or statute upon a person to

* Compare

R. S. B. C., c. 71, ss. 9, 10 and 16.
 R. S. Man., c. 57, ss. 8, 9, 10 and 11.
 R. S. N. B., c. 127, ss. 52 and 51.
 R. S. N. S., c. 163, ss. 5, 6, 7 and 8.

† Compare

R. S. B. C., c. 71, ss. 17 and 13.
 R. S. Man., c. 57, ss. 20 and 14.
 R. S. N. B., c. 127, ss. 55 and 72.
 R. S. N. S., c. 163, ss. 10 and 11.

register or certify that certain facts existed within his knowledge, the register or certificate would it seems be evidence of those facts; and in some cases the statute requiring the registration to be made provides that the register shall be evidence, although the facts are not within his knowledge, *e.g.*, registers of births and deaths. In other cases, however, the register would be admissible in proof of the fact of registration only. Thus, a report made by public officers is admissible only in proof that they have made a report, but not of the facts therein stated: *Sturla v. Freccia*, 5 Ap. Cas. 623, D. P. The term "public document" is used in the sense of one made by a public officer for the purpose of the public using it and being able to refer to it; the public having access thereto are not necessarily all the world, but may be limited, *e.g.*, the members of a corporation: *Id.*, 643. The contents of public documents which it is not desirable to remove from their place of deposit, such as those having references to shipping, navigation or trade, may be proved by examined copies: *Burpee v. Carrill*, 3 Pug. 141 (N.B.).

A notice of intention to offer in evidence a certified copy of a document need not state the particular court at which the document will be offered; it is sufficient if it states generally that the document will be offered at the trial of the cause, and it is good until the cause is tried: *Smith v Smith*, 37 N. B. R. 7.

The Ontario Evidence Act provides:—

How
public or
official
documents
proved.
By-laws,
etc., of cor-
porations.

26. Where the original record could be received in evidence, a copy of any official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of any entry in any register or other book of any corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation, and the hand of the presiding officer or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

Privilege
in case of
official
documents

27. Where a document is in the official possession, custody or power of a member of the executive council, or of the head of a department of the public service of Ontario, if the deputy head or other officer of the department has the document in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the executive council or head of the department, to object to produce the document on the ground that it is privileged; and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the executive council or head of the department were personally present and made the objection.

28. A copy of an entry in any book of account kept in any department of the government of Canada or of Ontario, shall be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof.

29. (1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom shall be admissible in evidence, if it is proved that it is an examined copy or extract or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted.

(2) Such officer shall furnish the certified copy or extract to any person applying for the same at a reasonable time, upon his paying therefor a sum not exceeding ten cents for every folio of one hundred words.*

As to documents in Crown Lands Department, the Ontario Revised Statutes, 1897, c. 28, s. 47, provides:

47. (1) Copies of records, documents, books or papers, belonging to or deposited in the department, attested under the signature of the Commissioner or of the Assistant Commissioner, shall be competent evidence in all cases in which the original records, documents, books or papers, could be evidence.

(2) Copies of licenses or other instruments or documents issued under the hand of the Commissioner or Assistant Commissioner, or other officer or agent of the department, by authority of this Act, or the Act respecting Timber on Public Lands, shall be received in any Court as *prima facie* evidence of the license, instrument or document, and of the contents thereof, if such copies are attested under the signature of the Commissioner or Assistant Commissioner and the official seal of the department.†

* Compare

- R. S. B. C., c. 71, ss. 18 and 14.
- R. S. Man., c. 57, ss. 15, 16 and 18.
- R. S. N. B., c. 127, ss. 56, 57 and 28.
- R. S. N. S., c. 163, ss. 13 and 14.

† Compare

- R. S. B. C., none.
- R. S. N. B., none.
- R. S. Man., none.
- R. S. N. S., c. 2, ss. 34 and 35.

As to journals of Provincial Legislature, the Ontario Statute relating to the Legislative Assembly, Ont. Acts, 1908, c. 5, secs. 58-60, provide:

Protection of persons publishing papers by order of Assembly. 58. (1) Any person who is a defendant in any civil proceeding commenced in any manner for or in respect of the publication of any report, paper, vote or proceeding by such person or by his servant by or under the authority of the Assembly may bring before the Court in which such proceeding is pending (first giving 24 hours' notice of his intention so to do to the plaintiff or his solicitor) a certificate under the hand of the Speaker or of the Clerk of the Assembly stating that the report, paper, vote or proceeding in respect whereof such proceeding has been commenced was published by such person or by his servant by order or under the authority of the Assembly, together with an affidavit verifying such certificate.

(2) The Court shall thereupon immediately stay such proceeding and the same and every writ or process issued therein shall be taken to be finally put an end to, determined and superseded.

Production of papers to Court and stay of proceedings. 59. (1) If a civil proceeding is commenced for or in respect of the publication of any copy of such report, paper, vote or proceeding the defendant at any stage of the proceeding may lay before the Court such report, paper, vote or proceeding and such copy, with an affidavit verifying such report, paper, vote or proceeding and the correctness of such copy.

(2) The Court shall thereupon immediately stay such proceeding and the same and every writ or process issued therein shall be taken to be finally put an end to, determined and superseded.

Bona fide publication good defence. 60. It shall be a good defence to any civil proceeding against a person for printing any extract from or abstract of any such report, paper, vote or proceeding that the extract or abstract was published *bona fide* and without malice.*

REGISTERED INSTRUMENTS.

As to registered instruments the Ontario Evidence Act provides:

Meaning of "instrument." 45. The word "instrument" in the next succeeding two sections shall have the meaning assigned to that word in section 2 of the Registry Act.

* Compare

R. S. B. C., none.

R. S. Man., none.

R. S. N. B., none.

R. S. N. S., c. 163, 19 and 20.

46. A copy of an instrument or memorial certified under the hand and seal of office of the Registrar, Master of Titles or Local Master of Titles, in whose office the same is deposited, filed, kept or registered, to be a true copy, shall be *prima facie* evidence of the original, except in the cases provided for in section 47.

[As to effect of production of an original duplicate the registration of which is certified, see c. 136, s. 63.] *

47. Where it would be necessary to produce and prove an instrument or memorial which has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove the same may give notice to the opposite party ten days at least before the trial, or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the Registrar, Master of Titles or Local Master of Titles, under his hand and seal of office, and in every such case the copy so certified shall be sufficient evidence of the instrument or memorial, and of its validity and contents, unless the party receiving the notice within four days after such receipt, gives notice that he disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any or either of the parties as may be deemed just.

48. (1) Where a public officer produces upon a subpoena an original document, it shall be deposited in Court, unless otherwise ordered, but if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as may be deemed necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original; and the officer shall be entitled to receive in addition to his ordinary fees, the fees for any certified copy, to be paid to him before it is delivered or filed.

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer, and the exhibit shall be retained in Court and filed.

* (Sic. in Statutes of 1909. C. 136 is superseded by c. 60 of Statutes of 1910.)

‡ Compare

R. S. B. C., c. 71, ss. 39, 40, 47 and 48.

R. S. Man., none.

R. S. N. B., c. 127, s. 63.

R. S. N. S., c. 163, ss. 24 and 30.

The Ontario Registry Act, c. 60 Ont. Acts 1910, provides; (ss. 22 and 52).

Registrar to furnish certified copies. 22. (1) On request of any person, the registrar shall furnish a certified copy under his hand and seal of office, of any instrument or memorial deposited, registered, or filed, and kept in his office.

Not bound to produce any papers, except on order of a judge. (2) No registrar or deputy registrar shall be required to produce any instrument or document in his custody as registrar or deputy registrar, unless ordered by a Judge of one of the Courts of Ontario, which order shall be produced to the officer issuing the subpoena requiring such production, and shall be by him noted in the margin of the subpoena.

[As to filing a certified copy in Court in lieu of original produced on subpoena, see Ontario Evidence Act, s. 48, supra.]

Copying into registry book. 52. (1) When an instrument is registered, the registrar shall make an entry thereof in the abstract and alphabetical index books, and record the instrument in the registry book, in the order in which

Filing instrument and affidavit. it is received, and file the same with the affidavit of execution, and any other affidavit or certificate accompanying it, and shall endorse on every such instrument and upon every duplicate or other original part of it, a certificate, Form 8, and shall therein mention the year, month, day, hour and minute in which the instrument was

Certificate and its effect. registered, stating in what book the same has been recorded, and the registration number; and shall sign the certificate, which shall be allowed and taken, in all Courts, as evidence of the respective registries.*

REGISTERS OF BIRTHS, BAPTISMS, MARRIAGES, ETC.

Parish registers of baptisms, marriages and burials may be proved by production of the register itself, or by examined copies: *B. N. P.*, 247. In order to prove the register of a marriage it is not necessary to call the attesting witnesses, but as the registry affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk or attesting witnesses or others present, or the handwriting of the parties may be proved: *Birt v. Barlow*, 1 Doug. 172. But whatever is sufficient to satisfy the jury as to the identity is good evidence: *Hubbard v. Lees*, L. R.

* Compare

R. S. B. C., c. 111, ss. 12, 46 and 48.

R. S. Man., c. 150, ss. 16, 36, 37 and 38, 51.

R. S. N. B., c. 151, s. 21.

R. S. N. S., c. 137, ss. 23 to 25, 34.

1 Ex. 255. To prove the handwriting of the parties in the register it is not necessary to produce the original register for that purpose, but the witness may speak to the handwriting in it without producing it: *Sayer v. Glossop*, 2 Exch. 400. A photograph may often be used for the purpose of identification: *R. v. Tolson*, 4 F. & F. 103. If the marriage is proved by a person who was present, it is not necessary to prove the registration or license or banns: *Allison's Case*, R. & Ry. 105.

Foreign registers of births, marriages and deaths would seem to be admissible if proved to have been prepared under official authority: *Abbott v. Abbott*, 28 L. J. P. M. & A. 57.

Parish Registers.—The registers of baptisms, marriages and burials, preserved in churches, are good evidence of the facts which it is the duty of the officiating minister to record in them: *B. N. P.*, 247. A registry of marriage is evidence of the time of the marriage: *Wallaston v. Barnes*, 1 M. & Rob. 386.

RES JUDICATA.

See JUDGMENT, ANTI.

The opinion given to the Government by the Court of Appeal upon a question referred to the Court under 61 V., c. 11, is an opinion only and cannot be a point passed upon *res judicata*, and is not even a compromise, a transaction, nor an arbitration, inasmuch as the question referred to the Court of Appeal is not by the consent of the parties, but upon the sole initiative of the Government: *Galindez v. The King*, Q. K. 26 S. C. 171.

RULES OR ORDERS OF COURT AND JUDGES' ORDERS.

An order (in the common law Courts formerly called a rule) of a superior Court is proved by an office copy thereof, for such a copy is the order itself: *Ludlow v. Charlton*, 9 C. & P. 242. A Judge's order may be proved either by producing the order itself signed by the Judge and delivered out in the usual way; or by proof of the rule or order, if any, making it a rule or order of the Court: *Still v. Halford*, 4 Camp. 17. An order of Court is not matter of record in the strict sense of the word: *R. v. Bingham*, 3 Y. & J. 101.

SENTENCES OF VISITORS, ETC.

In ejectment against a schoolmaster who has been removed by a sentence of the trustees of the school (such power being vested in them) for misbehaviour, it is not necessary for the plaintiffs to prove

the grounds of the sentence and the defendant cannot disprove them:
Davy v. Haddon, 3 Doug. 310.

SHIPPING.

The Dominion Admiralty Act, R. S. C. c. 141, s. 22, provides:—
 22. In the Province of Ontario:—

Remedy in
 case, when
 it may be
 enforced. (a) No right or remedy *in rem* given by this Act only shall be
 enforced as against any subsequent *bona fide* purchaser or mortgagee
 of a ship unless the proceedings for the enforcement thereof are
 begun within ninety days from the time when such right or remedy
 accrued;

Effect of
 this
 mortgage. (b) No right or remedy *in rem* given by this Act except a right
 or remedy *in rem* for the wages of seamen and other persons em-
 ployed on board a ship on any river, lake, canal, or inland water,
 of which the whole or part is in the Province of Ontario, shall be
 enforced as against any *bona fide* mortgagee under a mortgage duly
 executed and registered prior to the first day of October one thousand
 eight hundred and seventy-eight.

SHIP'S REGISTER.

Since the Merchant Shipping Act, 1854, the ship's registry is
prima facie evidence of all the matters contained in it or certified
 by the registrar in his certificate, as for instance that the ship is
 British: *R. v. Bjornsen*, 34 L. J. M. C. 180; or that the defendant
 is owner: *Hibbs v. Ross*, L. R. 1 Q. B. 154. Notwithstanding the
 provision in the Imperial Interpretation Act of 1889 that the repeal
 of an Act shall not affect any suit, proceeding or remedy under the
 repealed Act, in proceedings under the Merchants' Shipping Act of
 1854, proof of ownership of a ship may be made according to the
 mode provided in the Merchants' Shipping Act, 1894, by which the
 former Act is repealed. Under the Act of 1894 a copy of the registry
 of a ship registered in Liverpool, certified by the registrar-general of
 shipping at London, is sufficient proof of ownership: *The Queen v.*
The Sailing Ship "Troop" Company, 29 S. C. R. 662. In an action
 for services rendered to a vessel: Held, that oral evidence of owner-
 ship of a vessel was admissible, and that it was not necessary to pro-
 duce the certificate of registration for assuming that in actions by or
 against owners, the ownership must be proved by certificate, yet the
 mere ownership may not create a liability, and defendants may be
 liable apart from it under a contract made by their agent, as in this
 case by the purser. *Seemle*, that the objection was not open to the
 defendants after their proof without production of the certificate that
 W. B. had ceased to be owner: *Lake Superior Navigation Co. v.*
Beatty, 34 U. C. R. 201.

SIGNATURES OF JUDGES, ETC.

The Ontario Evidence Act provides (sections 30 and 31) : *

30. (1) All Courts, Judges, Justices, Masters, Clerks of Courts, Judicial Commissioners and other officers acting judicially, shall take judicial notice of the signature of any of the Judges of any Court in Canada, in Ontario and in every other Province and Territory in Canada, where such signature is appended or attached to any decree, order, certificate, affidavit, or judicial or official document.

(2) The Members of the Board of Railway Commissioners of Canada and of the Ontario Railway and Municipal Board, the Mining Commissioner and the Referees appointed under The Municipal Drainage Act shall be deemed Judges for the purposes of this section.

31. No proof shall be required of the handwriting or official position of any person certifying to the truth of any copy of or extract from any proclamation, order, regulation or appointment; and any such copy or extract may be in print or in writing, or partly in print and partly in writing.

Proof of
handwriting,
when
not
required.

STATUTES.

The printed statute book is used as evidence of a public statute, not as an authentic copy of the record itself, but as aids to the memory of what is supposed to be in every man's mind already. But the marginal note of a statute in the copy so printed forms no part of the statute itself, and cannot be used to explain or construe the section: *Claydon v. Greene*, L. R. 3 C. P. 511. The punctuation does not form part of the law: *Idem*, p. 522; nor the title: *R. v. Williams*, 1 W. Bl. 951. The preamble of a public general Act of Parliament reciting the existence of certain outrages is evidence to prove that fact; because in judgment of law every subject is privy to the making of it: *R. v. Sutton*, 4 M. & S. 532. But allegations of fact in a public statute are not conclusive: *R. v. Greene*, 6 Ad. & E. 548. Recitals in a printed Act are not conclusive either of fact or law: *R. v. Haughton*, 1 E. & B. 501. A private statute, though it contains a clause requiring it to be judicially noticed as a public one, is not evidence at all against strangers either of notice or any of the facts recited: *Taylor v. Parry*, 1 M. & R. 504. The Courts

* Compare

R. S. B. C., none.

R. S. Man., c. 57, s. 19.

R. S. N. B., none.

R. S. N. S., c. 163, s. 15.

are bound to take judicial notice of every public Act of the Provincial Legislature, though its operation may be locally limited: *Darling v. Hitchcock*, 25 U. C. R. 463, 28 U. C. R. 439.

The Ontario Evidence Act provides (sections 21 and 22) : *

Evidence
of letters
patent.

21. Letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland or of any other of His Majesty's Dominions may be proved by the production of an exemplification thereof or of the enrolment thereof under the Great Seal under which the same may have issued and such exemplification shall have the like force and effect for all purposes as the letters patent thereby exemplified as well against His Majesty as against all other persons whomsoever.

Copies of
Canadian
and Prov-
incial
statutes as
evidence.

22. Copies of Statutes, Official Gazettes, Ordinances, Regulations, Proclamations, Journals, Orders, Appointments to Office, notices thereof, and other public documents purporting to be printed by or under the authority of the Parliament of Great Britain and Ireland or of the Imperial Government or by or under the authority of the Government or of any legislative body of any Dominion, Commonwealth, State, Province, Colony, Territory or Possession within the King's dominions, shall be admitted in evidence to prove the contents thereof.

The following provisions of the Ontario Interpretation Act will be found of service:—

Acts to be
deemed
public
Acts.

39. Every Act shall, unless by express provision it is declared to be a private Act, be deemed to be a public Act, and shall be judicially noticed by all Judges, justices of the peace, and others, without being specially pleaded.

Preamble
to be a
part of Act

40. The preamble of an Act shall be deemed a part thereof and intended to assist in explaining the purport and object of the Act.

All Acts
remedial.

41. Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof.

Construc-
tion.

* Compare

R. S. B. C., none.

R. S. Man., c. 57, s. 7.

R. S. N. B., s. 127, s. 50,

R. S. N. S., c. 163, s. 3,

42. Where reference is made by number to two or more sections, subsections or clauses in any statute, the number first mentioned and the number last mentioned shall both be deemed to be included in the reference.

43. Where an Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant or issue any instrument, that is to say, any order-in-council, order, warrant, scheme, letters patent, rules, regulations, or by-laws, to give notices, to prescribe forms or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

44. Where any Act confers power to make, grant or issue any instrument, that is to say, any order-in-council, order, warrant, scheme, letters patent, rules, regulations or by-laws, expressions used in the instrument, if it is made after the 31st day of December, 1897, shall, unless the contrary intention appears, have the same respective meaning as in the Act conferring the power.

45. Every Act shall be construed as reserving to the Legislature the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person or party, whenever the repeal, amendment, revocation, restriction, or modification is deemed by the Legislature to be required for the public good.

49. The repeal of an Act or enactment shall not be deemed to be or to involve a declaration that such Act or enactment was, or was considered by the Legislature to have been, previously in force.

50. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

51. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by the Legislature to have been, different from the law as it has become under such Act as so amended.

52. The Legislature shall not, by re-enacting an Act or enactment or by revising, consolidating or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act or enactment or upon similar language.

Reference to number of sections to include first and last

number. What may be done under an Act before the date fixed for its commencement.

Expressions used in instruments issued under any Act to have same meaning as in the Act.

Reservation of power to repeal or amend.

Effect of repeal of Act on persons acting under it. As to Acts, etc., done before repeal.

Offences committed and penalties incurred not affected by repeal.

Rules, etc., made before repeal

Appoint-
ments and
bonds
before
repeal. 53. No Act or enactment shall affect in any manner or way whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby; nor if the Act be in the nature of a private Act, shall it affect the rights of any person, or body politic, corporate, or collegiate, such only excepted as are therein mentioned or referred to.

Otherrules
of con-
struction
applicable. 59. Nothing in this section shall exclude the application to any Act, of any rule of construction applicable thereto, and not inconsistent with this section.

The Dominion Interpretation Act contains the following (among other) provisions:—

Law
always
speaking. 10. The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act, and every part thereof according to its spirit, true intent and meaning. R. S. c. 1, s. 7.

Every Act
remedial. 15. Every Act and every provision and enactment thereof shall be deemed remedial, whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment according to its true intent, meaning and spirit. R. S. c. 1, s. 7.

Incorpor-
ation,
effect of. 30. In every Act, unless the contrary intention appears, words making any association, or number of persons, a corporation or body politic and corporate shall:

(a) Vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted and to alienate the same at pleasure; and

(b) Vest in a majority of the members of the corporation the power to bind the others by their acts; and

(c) Exempt individual members of the corporation from personal liability for its debts or obligations or acts, if they do not violate the provisions of the Act incorporating them.

Banking
powers. 2. No corporation shall be deemed to be authorized to carry on the business of banking unless such power is expressly conferred upon it by the Act creating such corporation.

31. In every Act, unless the contrary intention appears:

General
rules.

(a) If anything is directed to be done by or before a magistrate or a justice of the peace or other public functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done;

Magistrates, etc.

(b) Whenever power is given to any person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such person, officer, or functionary to do or enforce the doing of such act or thing;

Powers.

(c) When any act or thing is required to be done by more than two persons, a majority of them may do it;

Majorities.

(d) Whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them;

Forms.

(e) If a power is conferred or a duty imposed the power may be exercised, and the duty shall be performed from time to time as occasion requires;

Powers
and duties.

(f) If a power is conferred or a duty imposed on the holder of any office as such, the power may be exercised and the duty shall be performed by the holder for the time being of the office;

Idem.

(g) If a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or by-laws, and make others;

Rules,
regulations
and by-laws.

(h) If the time limited by any Act for any proceeding, or the doing of anything under its provisions expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday;

If time
falls on a
holiday.

(i) Words importing the masculine gender include females;

Masculine
includes
feminine.

(j) Words in the singular include the plural, and words in the plural include the singular;

Singular
and plural

(k) Words authorizing the appointment of any public officer or functionary, or any deputy, include the power of removing or suspending him, re-appointing, or re-instating him, or appointing another in his stead in the discretion of the authority in whom the power of appointment is vested;

Removal
and
suspension

(l) Words directing or empowering a minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a minister acting for, or if the office is vacant, in the place of such minister, under the authority of an order in council, and also his successors in such office, and his or their lawful deputy;

Ministers
and
deputies.

Other public officers. (m) Words directing or empowering any other public officer or functionary to do any act or thing or otherwise applying to him by his name of office, include his successors in such office, and his or their lawful deputy.

34. In every Act unless the context otherwise requires:—

“Commencement.” “Commencement,” when used with reference to an Act, means the time at which the Act comes into operation.

“Herein.” “Herein” used in any section shall be understood to relate to the whole Act, and not to that section only;

“Holiday.” “Holiday” includes Sundays, New Year’s Day, the Epiphany, Good Friday, the Ascension, All Saints’ Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday, or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated Labour Day, and any day appointed by proclamation for a general fast or thanksgiving.

“Month.” “Month” means a calendar month.

“Person.” “Person” includes any body corporate and politic, and the heirs, executors, administrators, or other legal representatives of such person, according to the law of that part of Canada to which the context extends.

“Shall.” “Shall” is to be construed as imperative, and “may” as permissive.

“May.” “Writing,” “written,” or any term of like import, includes words printed, painted, engraved, lithographed or otherwise traced or copied.

SURVEYORS' NOTES.

See ante under Patents for Land Grants: *Kenny v. Caldwell*, 21 A. R. 110; 24 S. C. R. 699. Old surveys not admitted as an evidence of the high-water mark at the time when they were made, either as being made by a deceased person in the course of his duty or as matter of public reputation: *Asshton-Smith v. Owen*, 75 L. J. Ch. 181; (1906), 1 Ch. 179; 94 L. T. 42; 10 Asp. M. C. 164; 22 T. L. R. 182. A surveyor had been employed in 1864 by a local board to survey ground comprising the property in question for the purpose of a drainage scheme. He had in the time made in his note-book, for the purpose of his report, entries of certain levels and other figures, and these entries were afterwards used by him in making his report. He was now dead:—Held, that the entries were admissible in evidence to shew the line to which the bi-monthly spring tides flowed at the date of the conveyance: *Mellor v. Walmsley*, 74 L. J. Ch. 475; (1905), 2 Ch. 164; 83 L. T. 574; 53 W. R. 581.

TELEGRAMS.

No privilege attaches to telegrams in the possession of a telegraph company. 45 V. c. 93, s. 18 (D.), should not be read as giving an absolute privilege:—Held, also, that the operator was the proper person to subpoena to produce telegrams, as he had the control of them and the ability to produce them: See *Dwight and Macklem*, 15 O. R. 148. The same principle that admits proof that letters were deposited in the post office, duly addressed, as tending to shew that they were received by the persons to whom they are addressed, applies to telegrams: *White v. Flemming*, 20 N. S. R. (8 R. & G.) 335 (N.S.). When a contract is attempted to be made out through telegrams, if that can be done at all, the messages signed by the parties must be produced, not the transcript taken from the wire: *Kinghorne v. Montreal Telegraph Co.*, 18 U. C. R. 60. A. telegraphed to B., "Will you sell us B. H. P.? Telegraph lowest cash price." B. telegraphed in reply, "Lowest price for B. H. P. 900 pounds." A. telegraphed, "We agree to buy B. H. P. for 900 pounds asked by you." B. did not reply:—Held, that there was no contract. The final telegram was not the acceptance of the offer, as there was no offer to sell, only an offer to buy, the acceptance of which must be express: *Harvey v. Facey* (1893), A. C. 552.

Distinguished and explained: *Philip v. Knoblanck* (1907), S. C. 994.

Where parties have corresponded by means of a telegraphic code, it is for the plaintiff, in an action for breach of contract, to shew that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe: *Falck v. Williams*, 69 L. J. P. C. 17; (1900), A. C. 176.

The defendants alleged that the telegraph company had made a mistake in the transmission of a message, but the original message as delivered by the defendants to the company at Vancouver was not proved:—Held, that assuming the mistake to be proved by proper evidence, the defendants were not responsible for it, for, even if the telegraph company were the defendant's agents, the authority of the agents was limited to the transmission of the message in the terms in which the defendants delivered it; and the document handed to the company for transmission was the original order which must be proved to establish the contract: *Henkel v. Pape* (1870), L. R. 6 Ex. 7, and *Kinghorne v. Montreal Telegraph Co.* (1859), 18 U. C. R. 60, followed. The fact of the destruction of the message delivered by the defendants to the telegraph company was not shewn, and though secondary evidence of the contents was given by the defendants, it was inadmissible, and there was therefore no evidence that the transcript delivered to the plaintiffs was incorrect. But the burden of proving

the contract was upon the plaintiffs; and the admission of the transcript in evidence without objection did not render its terms binding upon the defendants. It was not evidence of the order given by the defendants; it was relevant and admissible primary evidence to prove that the order had in fact been transmitted and delivered to the plaintiffs; but its admission in evidence did not excuse the plaintiffs from making proof of the order by production of the original or by proof of its destruction, or loss and secondary evidence of its contents: *Flynn et al. v. Kelly et al.*, 12 O. L. R. 1906. A telegram stopping a cheque may, reasonably and in the ordinary course of business, be acted upon by the bank at least to the extent of postponing the honouring of the cheque until further enquiry can be made; but, quære, whether the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque: *Curtice v. London City and Midland Bank*, 77 L. J. K. B. 341; (1908), 1 K. B. 293; 98 L. T. 190; 24 T. L. R. 176—C. A.

WILLS OF LAND.

See ante under Probate and Letters of Administration, page 86.

At common law, in order to prove a devise of lands, the will itself must be produced, for probate of the will was not even secondary evidence, as the Spiritual Court had not power to authenticate the will quoad anything but personalty: *B. N. P.*, 246. A lost will might be proved by a copy otherwise authenticated: *Sly v. Sly*, 2 P. D. 91; or by oral evidence: *Brown v. Brown*, 8 E. & B. 876; even though given by an interested witness. It might also be proved by written or oral declarations of the testator made before or after the execution of his will. Effect will be given to a lost will so far as its contents are proved: *Sugden v. S. Leonards, Ltd.*, 1 P. D. 154. An interlineation or alteration in a will is presumed to have been made after the execution of it: *Shallcross v. Palmer*, 20 L. J. Q. B. 367; but in the case of the interlineation of mere words required to complete the sense of the will, if they are written apparently at the same time with the same ink, this presumption is not a necessary one: *In re Cadge*, L. R. 1 P. & M. 543. To prove a will of land it is sufficient to call one of the witnesses if he can speak to all the requisites of attestation: *Wright v. Tatham*, 1 Ad. & E. 3. Where the witnesses are dead this fact and their handwriting should be proved: *Andrew v. Motley*, 12 C. B. N. S. 527; even though the witness of a will should swear that the will was not duly executed, evidence may be adduced in support of the will: *Bowman v. Hodgson*, L. R. 1 P. & M. 362. Where one witness gives evidence against due execution the party supporting the will must call the other witnesses: *Colex v. Colex*, L. R. 1 P. & M. 70. It does not seem

to be in general necessary to produce evidence *aliunde* that the formalities not mentioned in the attestation clause were gone through. A will thirty years old coming from the proper custody will be presumed in the same way as a deed to have been duly executed, although it bear some marks of cancellation: *Andrew v. Motley*, 12 C. B. N. S. 527. The thirty years are to be reckoned from the date of the will being executed: *Oldham v. Wolley*, 8 B. & C. 22. A will is sufficiently proved by the production of a certified copy when the notice required by 3rd R. S. c. 135, s. 36, has been given. It is also sufficiently attested where the testator could see the witnesses sign had he chosen to do so, though there was no proof that he did actually see them sign and they were in an adjoining room at the time: *Carrigan v. Carrigan*, 2 Old. 8 (N.S.). Probate of a will is now the necessary and only admissible evidence of title: *Simpson v. Stewart*, 10 M. L. R. 176 (Man.).

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained: *Gough v. McBride*, 10 U. C. C. P. 166, specially referred to. *McDonald v. McDougall*, 16 O. R. 401. In ejectment it was proved that defendant had the will, on which plaintiffs' title depended, in his possession when it was last seen, and that notice to produce it and a subpoena *duces tecum* had been served upon him. Defendant not having produced it, the registrar of the county produced a memorial of it, which was proved by one of the witnesses thereto, who also swore that he saw one McA. draw the will, and the latter swore that the memorial was a true copy of the will, which had been executed in his presence and that of another:—Held, that this evidence was properly admitted: *Hamilton v. Lightbody*, 21 U. C. C. P. 126.

In ejectment, in proof of the existence of a will, one H. swore that he saw the will, giving an explicit statement of its contents, and it also appeared that the devisees, of whom the heir-at-law was one, all submitted to and acted upon it:—Held, sufficient evidence of the existence of the will:—Held, also, that the will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietary interest and he being dead at the time of the trial. Semble, it was, on this ground, good primary evidence, not only against the heir-at-law and those claiming under him, but against third parties: *Brown v. Morrow*, 43 U. C. R. 436.

Sections 42 to 44 of the Ontario Evidence Act are as follows:—

42. In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will or letters of administration with the will annexed containing such devise or dis-

In administration of real estate, probate,

etc., to be
prima facie
evidence
of will, etc.,
after
certain
notice,
unless its
validity is
put in
issue.

Proof in
the case
of will of
real estate
filed in
Courts in
other
British
posses-
sions.

Certificate
to be
prima
facie
evidence.

position or a copy thereof under the seal of the Surrogate Court granting the same, or under the seal of the High Court, where the probate or letters of administration were granted by the former Court of Probate for Upper Canada, shall be *prima facie* evidence of the will, and of its validity and contents.

43. Where a person dies in any of His Majesty's Possessions out of Ontario, having made a will sufficient to pass real estate in Ontario, purporting to devise, charge or affect real estate in Ontario, the party desiring to establish any such disposition, after giving one month's notice to the opposite party to the proceeding of his intention so to do, may produce and file the probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the Court which granted the same with a certificate of the Judge, Registrar, or Clerk of such Court that the original will is filed and remains in the Court and purports to have been executed before two witnesses, and such probate or letters of administration or certified copy with such certificate shall, unless the Court otherwise orders, be *prima facie* evidence of the will and of its validity and contents.

44. The production of the certificate, in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the Judge, Registrar or Clerk, without proof of his appointment, authority or signature.

The fact that a will bears date thirty years before action is not alone sufficient under all circumstances to prove that that is the real age of the writing, even if it comes from the proper custody; but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will for thirty years: *Doe d. Stevens v. Clement*, 9 T. C. R. 650.

A notice, under C. S. U. C. c. 32, s. 9, of the intention to use the probate of D.'s will was served ten days before the actual day of trial, though not before the commission day of the assize; but a similar notice for the preceding assizes was admitted to have been served in time. Semble, that the first named notice was served in time, but that the plaintiff could avail himself of the other notice, for such a notice for one assize need not be repeated:—Held, that the fact of the last named notice stating the copy of probate to be stamped with the seal of the Surrogate of Ontario instead of the County of York, did not invalidate it: *Dehart v. Dehart*, 26 U. C. C. P. 489. Where probate of a will is produced at the hearing, in pursuance of notice served under 22 Vict. c. 93, and the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will and of its validity and contents; but if the notice to dispute has been served, and the will does not appear to be duly executed, the

Court will give liberty to adduce further evidence, by affidavit or otherwise, to shew that the several requisites of 4 Wm. IV. c. 1, as to the execution of wills, have been duly complied with: *Stewart v. Lees*, 24 Chy. 433. It appeared that search for the will was made in the office in which it would have been had it been admitted to probate; in the different registry offices of the counties in which the several parcels of land, of which the testator died seised, were situate; among the papers of the owners of the several parcels; among the papers of the only executor of three named in the will who could be found; among the papers of the draftsman of the will, and among those of several of the devisees:—Held, sufficient to let in secondary evidence of the will:—Held, also, that plaintiff's case was within s. 26, c. 51, R. S. O., 1877, under which they had served notice: *Brown v. Morrow*, 43 U. C. R. 436 (supra).

A notice of intention to give a probate in evidence as proof of the will under C. S. U. C. c. 32, s. 9, is available at any trial of the cause, and not merely at the first trial after the giving of the notice: *Wilson v. Baird*, 19 U. C. C. P. 98.

WRITS.

A writ must be proved by a copy of the record of it after its return; and this is said to be necessary whenever it is the gist of the action (*i.e., ut semble*), wherever it is treated as matter of record in the pleadings: *B. N. P.*, 234; otherwise the writ itself may be produced or secondary evidence given when its non-production is accounted for. If the defendant has to prove a writ the copy served on him by the plaintiff is primary evidence: *Stowe v. Querner*, L. R. 5 Ex. 155. A writ of execution is evidence for the sheriff or his vendee as against the execution debtor without producing the judgment; but not against strangers: *Batten v. Murless*, 6 M. & S. 110; nor is it evidence for the sheriff's vendee if he be the execution creditor: *Bland v. Smith*, Holt, N. P. 589.

WRITTEN INSTRUMENTS.

As to written instruments generally, the Ontario Evidence Act provides:—

49. (1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other written instrument used in business or other transactions, may give notice to the opposite party ten days at least before the trial or other proceeding in which the proof is intended to be adduced that he intends to give in evidence as proof of the contents, a writing purporting to be a copy of the document and in the notice shall name some convenient time and place for the inspection thereof.

Copies of certain documents may be admitted as evidence on certain conditions.

Inspection (2) Such copy may then be inspected by the opposite party; and shall without further proof be sufficient evidence of the contents of the original document, and be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original; and the costs attending any production or proof of the original document shall be in the discretion of the Court.

TRIALS.

The subjects contained in the remainder of Part I. will be discussed in the following order:

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TRIALS.

GENERAL PROVISIONS AS TO TRIALS.

SITTINGS.

The appointments for sittings for trials are left with the Judges of the High Court under Con. Rule 1897, 113, which is as follows:—

113. The Judges of the High Court of Justice (four of whom shall form a quorum for the transaction of business) shall appoint the days upon which the assizes and sittings for trials shall be held.

The preparation of cause lists is the duty of the registrar under Con. Rule, 1897, 26, which is as follows:—

26. The following business shall be transacted in the office of the Registrars:—

(b) The preparation of cause lists comprising the following, viz:

1. The setting down of actions for trial at sittings of the High Court in the County of York, and of motions, appeals, and other matters for sittings of the Divisional Courts of the High Court.

2. The setting down of all motions, special cases, and other matters required by the Rules to be set down for the sittings of the Weekly Court at Toronto.

3. The attendance with records, exhibits, and papers on the Court or Judges thereof, and the furnishing to the proper officer on his requisition of all papers and exhibits necessary for the purposes of all motions, appeals, special cases and other matters.

4. The custody of the records, exhibits, affidavits, and papers relating to the matters aforesaid until the conclusion of the same.

A Judge *ad audi prius* has authority to make such order at the time of trial of the causes as to him may seem requisite for the effectual despatch of the business of the Court, and it is the duty of the attorney and counsel in a cause to attend until the case is disposed of. It is no ground for setting aside a verdict on the score of irregularity, that a cause has been tried out of its order in consequence of several causes standing on the docket before it have been put off by consent to a future day: *Bowes v. Sutherland*, 2 Kerr 1 (N.B.). A party who finds himself at the trial without some important witness should ask for an adjournment of the trial instead of proceeding with the trial. If he proceeds a new trial will not afterwards be granted: *Morice v. Baird*, 6 M. L. R. 241 (Man.). Illness of the attorney in a cause is a sufficient ground for putting off a trial—so also any unforeseen absence of the attorney. Per Allen, C.J.: *Jackson v. McLellan*, vol. 19, 432 (N.B.).

Sittings for trials of causes must be held according to the directions of sections 82 to 91 of the Judicature Act, R. S. O. 1897, c. 51.* These sections are as follows:—

82. (1) Subject to rules of Court, as often in every year as the due despatch of business and the public convenience may require there shall be sittings of the High Court at every county town for the trial of causes, matters and issues, whether legal or equitable, in all divisions of the High Court, which are to be heard and determined by a Judge without a jury, and also for the trial of causes, matters and issues in all divisions of the High Court which are to be tried with a jury, and for the trial of criminal matters and proceedings; and in case such first mentioned sittings are appointed at any county town for the same time and before the same Judge as jury cases, separate lists shall be made of the jury and non-jury cases, and the jury cases shall be first disposed of, unless the Judge sees fit to direct otherwise.

Sittings
for trial
of causes.

(2) The Judges of the High Court of Justice, or a majority of them, shall appoint the days upon which such sittings shall be held.

83. (1) Subject to rules of Court, not less than two of such sittings shall be held at the county town of every county and union of counties in each year.

Sittings
in each
county.

(2) In the county of York, there shall in every year be held at the county town of such county not less than three of such sittings.

* Compare

R. S. B. C., c. 56, ss. 44 to 54.

R. S. Man., c. 40, ss. 42 to 56.

R. S. N. B., c. 112, s. 10 and 11.

R. S. N. S., c. 155, ss. 20 to 40.

and also a fourth such sittings, unless the same is not required for the administration of justice, but if the said Judges, on enquiry, ascertain that such fourth sittings for any year is not required for the administration of justice, it shall not be necessary to hold the same or to appoint a day for holding the same.

Carleton,
Wentworth,
Middlesex

(3) In the counties of Carleton, Wentworth and Middlesex, there shall, in every year, be held at the county town of each of the said counties not less than three of such sittings.

Additional
sittings.

(4) In addition to the regular sittings to be held under subsection 1 of this section, a third such sittings may be appointed if the Judges of the High Court, or a majority of them, shall see fit, for the trial of civil causes, matters and issues, and criminal matters and proceedings, or of civil causes, matters and issues only, to be held at the county town of any county in the province.

Judges
may
appoint
sittings in
any county
for issues
to be tried
without a
jury.

84. The Judges of the High Court may appoint sittings of the High Court in any county in the province, as often and at such times as they see fit, for the trial of causes which are to be tried by a Judge without a jury.

Separate
sittings
may be
held for
civil and
criminal
matters.
Place in
county
towns
where
court to be
held.

85. The sittings of the High Court for the trial of civil causes, matters and issues in any county may, in the discretion of the Judges appointing the days therefor, or of the Judge who has been appointed to preside or is presiding thereat, be held separate and apart from the sittings for the trial of criminal matters and proceedings, either on the same day or on a different day.

86. Such sittings may, at the discretion of the Court or of the Judge who is to hold the same, be held in the court house of the county town in which the same are appointed to be held, or in such other place in the county town as the Judge selects, and the Judge shall in all respects have the same authority as a Judge formerly had when sitting at *nisi prius* in regard to the use of the court house, gaol and other buildings or apartments set apart in the county for the administration of justice.

Who may
preside.

87. (1) Such sittings shall be presided over by one of the Judges of the Supreme Court, or in the absence of any such Judge by a retired Judge of the Supreme Court, or by a Judge of any County Court in Ontario, or by one of Her Majesty's counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or counsel being requested by a Judge of the Supreme Court to attend for that purpose.

Powers of
sitting
Judge.

(2) Such Judge or counsel while holding the sittings shall possess, exercise and enjoy all the powers and authorities of a Judge of the High Court, and in civil proceedings may reserve the giving of his decision upon questions raised at the trial, and such decision

shall have the like force and effect as the decision of a Judge of the High Court.

88. Where the Judge whose duty it is to hold any sittings of the High Court for the trial of civil causes, matters and issues, and for the trial of other matters and proceedings within the jurisdiction of the Provincial Legislature, does not arrive in time, or is not able to open such Court on the day appointed for that purpose, the sheriff of the county in which such Court should be held, or, in his absence, his deputy, may, after the hour of six of the clock in the afternoon of such day, adjourn by his proclamation, the Court which should have been opened on that day, to an hour on the following day to be by him named, and so from day to day until the Judge arrives to open such Court, or until such sheriff receives other direction from the Judge in that behalf.

89. (1) No such sittings of the High Court for the trial of causes, matters and issues, shall open earlier than one of the clock in the afternoon on the first day of the sittings, but this shall not prevent a non-jury trial from being begun before one of the clock with the consent of the parties.

(2) No such sittings shall begin before nine o'clock in the forenoon, nor, except for special reasons, extend beyond seven o'clock in the evening, with at least a half-hour's intermission at or near noon. An irregularity under this section shall not render any trial or other proceeding void.

90. All non-jury actions in any county may be entered for trial at any sittings of the High Court in such county, except in the county of York.

91. At the sittings of the High Court or assizes in any county town there shall be a general docket in addition to the docket of cases entered for trial, and such general docket may include all motions, petitions, proceedings and other matters which may be heard by a Judge in Court or in chambers in any case where the solicitors consent, or where the matter in controversy arose in the county or where the party opposing or showing cause in the matter, or his solicitor, resides in the county. Such general docket shall be disposed of after the trial of causes.

TRIAL OF HIGH COURT CASES IN COUNTY COURTS, AND COUNTY COURT CASES BEFORE HIGH COURT.

In like manner rules have been made for the trial of High Court cases in County Courts, and County Court cases before the High Court, by sections 92 to 96 of the Judicature Act, R. S. O. 1897, c. 71. These sections are as follows:

Certain cases in the High Court may be tried in the County Court of the County in which the venue is laid.

92. (1) All issues of fact and assessments of damages in the High Court relating to debt, covenant and contract, where the amount is liquidated, or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the county where the trial is to take place, if the plaintiff desires it, unless a Judge of the High Court otherwise orders, and upon such terms as the Judge deems meet.

(2) In such case the action shall be entered for trial, notice of trial shall be given, and the trial take place in the same way as in ordinary cases in such County Court.

Certain cases in the High Court may be tried at the County Court of the County in which the action is to be tried.

(3) In any action in the High Court, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of the said High Court is satisfied that the case may be properly tried in a County Court, any Judge of the High Court may order that such case shall be tried in the County Court of the county, the county town of which is named as the place of trial, and such action shall be tried there accordingly, and the record shall be made up as in other cases and the order directing the case to be tried in the County Court shall be left with the clerk of the County Court on entering the action for trial, annexed to the record; and the trial shall take place in the same way as in ordinary cases in such County Court.

Proceedings in such case.

By order County Court cases may be tried at High Court sittings.

93. (1) By the order of a Judge of the High Court, made upon such terms as the Judge may consider just, the issues of fact and assessment of damages in any action pending in a County Court may be tried and assessed at the sittings of the High Court at any county town.

(2) In such cases the action shall be entered and the case tried as in ordinary cases.

Powers of County Court

afterwards

94. Where any such cause is referred by the presiding Judge at such sittings, the County Court in which the action is brought, and the Judge thereof, shall have the same power to enforce any award, report or certificate made on the reference, and to make rules and orders upon appeals therefrom and motions relating thereto, as if the order referring the case had been made by the County Judge.

Books for Judge's notes of trial, etc. Fees to officers.

Section 95 relates to books for Judge's notes of trial, &c.

96. The jury fees and the fees and charges payable and pertaining to officers of the County Courts, upon all actions or proceedings brought in the County Courts and tried or assessed in the High Court, shall be chargeable and paid as if the same were being tried or assessed in the County Courts; and no other fees shall be chargeable thereon, and the Clerk of a County Court shall be entitled to receive and take such part thereof as pertains to him to his own use.

In such case Con. Rules 1897, 564 and 565 apply. These rules are as follows:

564. In an action in a County Court entered for trial at any sittings of the High Court the Judge presiding at the sittings shall have the same powers as to amendment of the pleadings and proceedings putting off the trial reference making the cause a *remanet* and otherwise dealing with the cause and proceedings therein, as if the action had been commenced in the High Court.

565. Wherever the Judge indorses on the record in any such action the word *remanet*, and adds any words to the effect following: "And the within cause may be entered and tried at any County Court or sittings of the High Court," such cause may without payment of any further fee for entering the case be entered at any subsequent sittings of the County Court or sittings of the High Court for which notice of trial may be given, and the case may be tried and disposed of in the same way as any other case entered at such sittings.

TRANSFERENCE OF CASES.

Cases may be transferred from inferior Courts to superior Courts under the provisions of section 186 of the Judicature Act,* and from a High Court to an inferior Court under section 186a added to the Judicature Act by sub-section 5 of section 7 of Ontario Acts, 1910.

LEGAL AND EQUITABLE ISSUES.

Where equitable issues are raised, or legal and equitable issues, the Con. Rules, 1897, 550 and 551, provide as follows: †

550. Where equitable issues are raised by the pleadings they shall be heard and tried, and the damages, if any, incidental thereto assessed by the Judge without the intervention of a jury; but he may order such issues to be tried or damages assessed by a jury.

551. Where both legal and equitable issues are raised, and notice for a jury has been given, or the action is one to which section 109 of the Judicature Act, 1895 (now sec. 102 of the Revised Statute), applies, the action or proceeding shall (unless the Court or Judge

* Compare

R. S. B. C., c. 52, s. 26.

R. S. Man., c. 40, s. 90.

R. S. N. B., c. 116, ss. 69 and 70.

R. S. N. S., c. 156, s. 41.

† C. R., 550, 551.

Compare

B. C. Rule, 331.

N. S. Rules, Order XXXIV., s. 2.

otherwise orders, in cases to which said section 109 does not apply), be entered for trial at the proper jury sittings and (subject to Rule 550 and sections 111 and 114 (R. S. secs. 105, 106, and 110) of the said Act such issues shall be tried at the same time unless the Judge presiding at the trial otherwise directs.

DEFENCES IN ACTIONS ON QUEBEC JUDGMENTS.

The Judicature Act, sections 117, 118, provides as follows:

Suit upon judgment in Quebec, where service was personal. 117. In any action brought in Ontario on a judgment obtained in the province of Quebec in an action in which the service of notice on the defendant or party sued has been personal, no defence that might have been set up to the original action shall be pleaded to that brought on the judgment.

Suit upon judgment in Quebec, where the service was not personal. 118. In any action brought in Ontario on a judgment obtained in the Province of Quebec in an action in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original action may be made to the action on the judgment.

DISCOVERY.

Consolidated Rules, 1897, provide as follows:

Depositions, how may be evidence. 461. Any party may at the trial of an action or issue, use in evidence any part of the examination of the opposite party, but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

Medical examination in action in respect of bodily injury. 462. In any action brought to recover damages or other compensation for or in respect of bodily injury sustained by any person, the Court or a Judge, or any person who, by consent of parties or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation is sought shall submit to be examined by a duly qualified medical practitioner who is not a witness on either side, and may make such order respecting such examination and the costs thereof as he may think fit. The medical practitioner named in such order shall be selected by the Court or Judge making the order, and may afterwards be a witness on the trial unless the Judge before whom the action is tried otherwise directs.*

Notice to produce documents referred 469. (1) A party shall be entitled to obtain the production for inspection of any documents referred to in the pleadings or affidavits

* See Section 104b added to Judicature Act by Sub-section 1 of Section 7 of Chapter 26 of Ontario Acts, 1910, verbatim the same as above rule.

of the opposite party by giving a notice (according to Form No. 60) to the solicitor of such opposite party, and shall be entitled to take copies of such documents when so produced for inspection.

(2) Any party not producing any document in compliance with such notice shall not afterwards be at liberty to use the document in evidence in the cause, matter or proceeding, unless he satisfies the Court or Judge, as the case may be, that he had some sufficient cause for not complying with the notice.

470. The party to whom such notice is given shall within two days from the receipt thereof deliver to the party giving the same a notice (according to Form No. 61) stating a time within three days from the delivery thereof at which the documents may be inspected at the office of his solicitor, and stating which if any of the documents he objects to produce and on what ground.*

471. If the party served with such notice omits to give such notice of the time for inspection, or omits or objects to give such inspection, the party desiring it may apply to a Judge of the High Court for an order for inspection.

472. If the party from whom discovery of any kind or inspection is sought, objects to the same or any part thereof, the Court or a Judge, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in

* Con. Rule, 470.

Compare

B. C. Rule, 288.

N. S. Rules, Order XXX., s. 17.

Man., c. 40, Rule 417.

N. W. T., c. 21, Order XX., s. 195.

Con. Rule, 471.

Compare

B. C. Rule, 289.

N. S. Rules, Order XXX., s. 18, s.-s. I.

Man., c. 40, Rule 418.

N. W. T., c. 21, Order XX., s. 196.

Con. Rule, 472.

Compare

B. C. Rule, 290.

Man., c. 40, Rule 420.

N. S. Rules, Order XXX., s. 19.

N. W. T., c. 21, Order XX., s. 197.

Con. R. 473.

Compare

B. C., none.

Man., c. 40, Rule 421.

N. S. Rules, Order XXX., s. 20.

N. W. T., c. 21, Order XX., s. 198.

the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Consequences of
disobeying
an order
for discovery.

473. If a party fails to comply with any order for production or inspection of documents, he shall be liable to attachment. He shall also be liable if a plaintiff to have his action dismissed, and if a defendant to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party who obtained the order for production or inspection may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

Service of
notice on
solicitor,
when sufficient.

474. Where the application for such last mentioned order is made by reason of default in production of books and papers in the master's office, or pursuant to an order to produce, or in carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same is to be sufficient service.

NOTICE OF TRIAL.

C. R. 538.* Except in the cases provided for by Rule 542:

(a) Notice of trial shall be given before entering an action for trial, and may be according to Form No. 65.

10 days' notice.
Short notice, 5 days.
Entry for trial.

(b) Ten days' notice of trial shall be given and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be five days' notice.

(c) After notice of trial is given either party may enter the action for trial. If both parties enter the action for trial at the same sitting it shall be tried in the order of the plaintiff's entry.

Time of entry for trial.

(d) Actions shall be entered for trial not later than the third day next before the first day of the sittings, but the Judge at the trial may permit any action to be entered after the time above limited.

Non-jury actions.

(e) An action which is to be tried without a jury may be entered for trial at any sittings appointed for the place named for the trial of such action.

Setting down and notice of trial in non-jury cases, York.

542. (1) Actions to be tried at Toronto without a jury may be set down for trial by either party immediately after the close of the pleadings.

* Compare

B. C. Rules, 339 to 346.

R. S. Man., c. 40, ss. 552, 553, 555 to 557.

N. S. Rules, Order XXXIV., ss. 10 to 18.

(2) Notice of trial (which may be according to Form No. 66) shall be given by the party setting down the action for trial within two days thereafter, and he shall within four days after so setting down the action file the notice of trial and proof of the service thereof with the officer by whom the action was set down.

(3) Where default is made in filing the notice of trial as aforesaid, any party who has been served therewith may within 4 days after such default file in like manner the notice of trial served on him and proof of the service thereof.

(4) Where a notice of trial is filed as aforesaid, the action shall be placed by the proper officer upon the list of cases for trial upon the expiration of three weeks from the date of the setting down.

(5) If more parties than one have caused the action to be placed on the list of cases for trial it shall be tried in the order of the first entry.

By Con. Rule 1897, 532: "The trial of questions or issues of fact by a jury shall be held before one Judge unless otherwise ordered." Trials at bar may also be had under the provisions of Con. Rules, 1897, 533 to 536, inclusive. These rules are as follows:—

533. A party may within thirty days after issue joined, apply to the Divisional Court for a trial at bar, and the Court may, in its discretion, upon hearing the parties, grant or refuse the same.

Trials at bar on the part of suitors.

534. Where the Crown is actually or immediately interested a trial at bar may be had as of right, upon, and shall be regulated and governed by, the same principles as in similar cases in England.

On the part of the Crown.

535. Where a trial at bar is directed, the President of the High Court may appoint the day for the trial.

When trial to be had.

536. Notice of a trial at bar shall be given to one of the registrars of the Court before giving notice of trial to the party.*

Notice of trial at bar.

WITHDRAWING FROM TRIAL.

543.† An action may be withdrawn from trial by either party upon producing a consent in writing signed by the other, but not otherwise except by order.

Withdrawal of record by consent.

544. Actions not tried or disposed of after being once entered for trial shall remain for trial, and shall not except in the case of actions

Actions not tried.

* C. R. 533 to 536.

Compare R. S. Man., s. 40, ss. 549 to 552.

† Compare

B. C. Rules, 353 and 354.

R. S. Man., c. 40, ss. 559 to 562.

N. S. Rules, Order XXVI., s. 2, Order XXXIV., ss. 22 and 23.

R. S. N. W. T., c. 21, vol. I., s. 175.

entered for trial without a jury at Toronto, be heard at any subsequent sittings unless and until a fresh notice of trial is given.

Non-ap-
pearance of
defendant: 545. If when an action is called on for trial, the plaintiff appears and the defendant does not, the plaintiff may prove his claim as far as the burden of proof lies upon him.

Non-ap-
pearance of
plaintiff: 546. If when an action is called on for trial the defendant appears and the plaintiff does not, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action; but if he has a counterclaim he may prove such claim as far as the burden of proof lies upon him.

JURIES.*

But we will now suppose all previous steps to be regularly settled and the cause to be called on in Court. The record is then handed to the Judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of *habeas corpora* or *distringas*, with the panel of jurors annexed to the Judge's officer in Court. The jurors contained in the panel are either special or common jurors. Special jurors were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. A common jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight or more than seventy-two jurors; and that their names being written on tickets shall be put into a box or glass; and when each cause is called twelve of these persons whose names shall be first drawn out of the box shall be sworn upon the jury, unless absent, challenged or excused; or unless a previous view of the messuages, lands or place in question shall have been thought necessary by the Court; in which case six or more of the jurors returned to be agreed on by the parties or named by a Judge or other proper officer of the Court shall be appointed by special writ of *habeas corpora* or *distringas* to have the matters in question shewn to them by two persons named in the writ, and then such of the jury as have had the view or so many of them as appear shall be sworn on the inquest previous to any other jurors. These Acts are well calculated to restrain any suspicion of partiality in the sheriff or any tampering with the jurors when returned. As the jurors appear

*Blackstone, continued.

when called they shall be sworn unless challenged by either party. Challenges are of two sorts, challenges to the array and challenges to the polls. Challenges to the array are at once an exception to the whole panel in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff or his under-officer who arrayed the panel. And generally speaking the same reasons that before the awarding the venire were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array when made by a person or officer of whose partiality there is any tolerable ground for suspicion. And also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination or under the direction of either party, this is good cause of challenge to the array. Challenges to the polls *in capita* are exceptions to particular jurors. By the laws of England in the times of Bracton and Fleta a Judge might be refused for good cause, but now the law is otherwise, and it is held that Judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a Judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly, such as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the Judge is accountable for his conduct. But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke, *propter honoris respectum; propter defectum; propter affectum; and propter delictum*. 1. *Propter honoris respectum*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself. 2. *Propter defectum*; as if a jurymen be an alien born, this is defect of birth; if he be a slave or bondman this is defect of liberty, and he cannot be *liber et legalis homo*. 3. Jurors may be challenged *propter affectum* for suspicion of bias or partiality. This may be either a principal challenge or to the favour. A principal challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour; as that a juror is of kin to either party within the ninth degree, that he has been arbitrator on either side, that he has an interest in the cause; that there is an action depending between him and the party; that he had taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him. All these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges to the favour are where the party hath no principal challenge, but objects only some probable circumstances of suspicion as acquaintance and the like, the

validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors in case the first man called be challenged are two indifferent persons named by the Court; and if they try one man and find him indifferent he shall be sworn, and then he and the two triors shall try the next, and when another is found indifferent and sworn the two triors shall be superseded, and the two first sworn on the jury shall try the next.

4. Challenges *propter delictum* are for some crime or misdemeanour that affects the juror's credit and renders him infamous, as for a conviction of treason, felony, perjury or conspiracy. A juror may himself be examined on oath of *voir dire veritatem dicere* with regard to such causes of challenge as are not to his dishonour or discredit, but not with regard to any crime or anything which tends to his disgrace or disadvantage. Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be excluded from serving, there are also other causes to be made use of by the jurors themselves which are matter of exemption whereby their service is excused and not excluded. If by means of challenges or other cause a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of such men as are summoned upon the first panel in order to make up the deficiency. For this purpose a writ of *decem tales octo tales* and the like was used to be issued to the sheriff at common law, and must be still so done at a trial at bar if the jurors make default. But at the assizes or *nisi prius* by virtue of statute 35 Hen. VIII. c. 6. and other subsequent statutes, the Judge is empowered at the prayer of either party to award a *tales de circumstantibus* of persons present in Court to be joined to the other jurors to try the cause, who are liable, however, to the same challenges as the principal jurors. This is usually done till the legal number of twelve be completed. When a sufficient number of persons impanelled or *talesmen* appear they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence, and hence they are denominated the jury *jurata*, and the jurors *sc. juratores*.

A new trial was ordered upon payment of costs, where it was shewn that one of the jurors was not selected to be of the panel, that another was so deaf that he was not able to hear some of the most important evidence, and that a third was in such friendly relations with the defendants, an incorporated company, as should have induced him to decline to sit on the trial: *Cameron v. Ottawa Electric R. W. Co.*, 32 O. R. 24. Attempting to dissuade a witness from giving

evidence is such misconduct on the part of a juror as would justify the granting of a new trial: *Laughlin v Harvey*, 24 A. R. 438. The Court will not grant a new trial because one of the jurors has not been sworn, where no injustice is done thereby: *Goose v. Grand Trunk R. W. Co.*, 17 O. R. 721. During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiff's solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court or take any action with respect to it, and proceeded with the trial to its close, when the jury brought in a verdict for the defendants. Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury:—Held, that the objection was too late: *Tiffany v. McNee*, *Metcalfe v. McNee*, 24 O. R. 551.

Where the plaintiff during the trial had conversation with members of the jury upon the subject of his case, and his brother and also his solicitor had treated some of them to "drinks" during the recess of the Court, the verdict was set aside, and a new trial ordered: *Stewart v. Woolman*, 26 O. R. 714.

SELECTED SECTIONS FROM THE ONTARIO ACT RESPECTING JURORS AND JURIES, ONT. STATS, 1909, C. 34.

87. The omission to observe any of the directions in this Act as respects the qualification, selection, balloting, and distribution of jurors, the preparation of the jurors' book, the selecting of jury lists from the jurors' rolls, the drafting of panels from the jury lists, or the striking of special juries, shall not be a ground of impeaching the verdict or judgment in any action.

Omissions to observe the directions of this Act, not to vitiate the verdict.

111. (1) It shall be a contempt of Court for any person interested in an action in any Court, or his solicitor, counsel, agent or emissary before or during the sittings of Court at which the action is, or is to be, entered for trial or may be tried, or at any time after a juror has been summoned, knowingly, directly or indirectly to speak to or consult with a juror upon the jury panel for such Court respecting such action, or any matter or thing relating thereto.

Tampering with jurors.

(2) Where a solicitor or barrister or student at law or articled clerk is guilty of such offence he may in addition to any other penalty be struck from the roll of solicitors or be disbarred or suspended from the practice of his profession for a limited time, or his name may be erased from the list of the Law Society or removed there-

Barrister, solicitor or student to be disbarred or suspended.

Compare

R. S. B. C., c. 107, s. 97.

R. S. Man., none.

R. S. N. B., none.

Ord. N. W. T., none.

R. S. N. S., c. 162, s. 73.

from for a limited time by the High Court upon motion at the instance and in the name of the Attorney-General.

Exception where juror is a party or witness.

(3) This section shall not apply where a juror is also a party to or a known witness or interested in the action or is otherwise ineligible as a juror in the action, nor to anything which may properly take place in the course of the trial or conduct of the action.

By Con. Rules 1897, 22 (m), preparing precepts for summoning juries and transmitting them to the proper officer is one of the duties of the records and writs office.

CHALLENGES.

The want of qualification a good ground of challenge. Proviso.

74.* (1) If any person not duly qualified is drawn as a juror for the trial of any issue in any matter or proceeding, the want of such qualification shall be a good cause of challenge; but the want of a sufficient property qualification shall not be a good cause of challenge, nor a cause for discharging the juror upon his own application.

In civil cases, each party may challenge four peremptorily.

75. In any cause the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial; and such right of challenge shall extend to the King, when a party.

Not to apply to special jurors.

76. The two next preceding sections shall not apply to special jurors.

Ratepayers, officers, etc., of corporations may be challenged as jurors.

77. In a matter or proceeding to which a municipal corporation other than a county is a party, every ratepayer and every officer or servant of the corporation shall, for that reason, be liable to challenge as a juror.

It is no ground for a challenge to the array that the jury was summoned by a coroner who was the deputy sheriff of the county, who was disqualified by reason of being a ratepayer in the town the corporation whereof were the defendants in the action, or that the coroner summoned the jury under a notice by the clerk of the circuits, pursuant to s. 18 of c. 126, C. S. N. B. 1903, and no venire was issued: *Millmore v. Town of Woodstock*, 38 N. B. R. 133. The fact that a juror was related to the plaintiff's wife, which was not known to either party or their attorneys at the time of the trial, and that two other jurymen were open to challenge on the ground that they had not the necessary property qualification, are not grounds

* Compare

R. S. B. C., c. 107, s. 65.

R. S. Man., c. 92, ss. 75 to 77.

R. S. N. B., c. 126, ss. 29 and 30.

R. S. N. S., c. 162, s. 55.

Ord. N. W. T., c. 28, s. 7.

for a new trial: *Nadeau v. Theriault*, 37 N. B. R. 498. Where the jury panel has been exhausted by reason of some of the jurors being out in another case, the presiding Judge may direct talesmen to be summoned: *Ibid*.

It is no ground for challenging the jury that the sheriff is one of the parties to the suit: *Harris v. McKenzie*, 2 Thom. 242 (N.S.). It is a matter for the discretion of the Court whether a defect in the jury lists or in the panel, which has not been made a ground of objection at the trial, is a sufficient cause for setting aside a verdict. The omission of the residences and occupations of the jurors in the lists returned by the justices:—Held, sufficient ground for quashing indictments found by the grand jury and for setting aside special jury panels in causes not tried, but not sufficient to disturb verdicts in causes where the objection was not made at the trial unless it be shewn that injustice has been done: *Lessee of Seaman v. Campbell, James*, 94 (N.S.). When the facts stated in the challenge would not be necessary to disqualify the sheriff from summoning the jury and might or might not render him partial, the challenge is to the favour and it should in the addition to the facts relied on contain an allegation that the sheriff was not impartial, otherwise it is bad: *Semble, A venire* may be issued to a coroner on a suggestion on a record that the sheriff for the reasons stated is not impartial: *Brown v. Maltby, et al.*, vol. 20 (2) (N.B.). It is no ground for challenge to the array that the sheriff who summoned the jury is a ratepayer of the defendant municipality: *Mellon v. Municipality of Kings*, vol. 33 (8) (N.B.). The defendant may challenge the array if affinity exists between the sheriff who summoned the jury and himself: *Wetmore v. Levy*, 5 All. 180 (N.B.). At the trial of an action the defendant's counsel challenged a juryman for cause. On the trial Judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the Judge, and the juryman remained on the jury:—Held, that on a motion for a new trial an objection to the juryman could not be entertained. The action was tried at B. and a new trial was moved for at a place other than B., because the jury there were biased against defendant:—Held, that this formed no ground for a new trial: *Wood v. McPherson*, 17 O. R. 163. The defendants having delivered separate defences and being separately represented at the trial, claimed to be entitled under the Jurors Act, R. S. O. 1887, c. 52, s. 110, to four peremptory challenges each which, though objected to by the plaintiff, was conceded by the Judge, and the defendants challenged six jurors between them, and the trial proceeded, resulting in a verdict for the defendants:—Held, upon motion by the plaintiff, that there had been a mis-trial, and the plaintiff was entitled to a new trial. Under the above section the de-

fendants were only entitled to four peremptory challenges between them, and inasmuch as the plaintiff took the objection at the time he had not waived his right to complain by proceeding with the trial: *Empey v. Carscallen*, 24 O. R. 658. It is no ground of challenge to a juror in an action brought by a corporation that he is in the employ of one of the stockholders in the company: *Fredericton Boom Co. v. McPherson*, 2 Han. 8 (N.B.). The fact that one of the jurors was nearly connected by marriage with the plaintiff was held to be no ground for setting aside a verdict for plaintiff, where it was not disclosed that the affinity continued at the time of trial, or that there was any issue of the marriage still living, or anything else from which it could be inferred that the mistake was productive of any injustice, and where it appeared that the defendant was aware of the connection before the trial was over, but took no exception till he found that the verdict was against him: *Hart v. Pryor et al.*, 1 R. & C. 53 (N.S.). A challenge lies both to the array of the grand jury and to the polls as in the case of a petit jury. *Semble*, that the reasons for quashing the panel (as for favour), which were founded on the discretion of the sheriff in selecting jurors, do not apply at the present time, as the sheriff empanels the jury from lists of selected jurors prepared for him. But a substantial departure of the sheriff from statutory directions might lay the panel open to challenge on the ground of default of the sheriff: *Reg. v. Anderson*, T. W. 177 M. L. R. (Man.). It is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time. Ignorance of the English language would not in this Province be a ground of challenge of a juror: *Reg. v. Earl*, 10 M. L. R. 303 (Man.).

The Ontario Jury Act, 1909, provides as follows:—

SPECIAL JURIES.

Either party may strike a special jury.

78. (1) In any case whatever, whether civil or criminal, triable by a jury, excepting only indictments for treason or felony, His Majesty or any prosecutor, relator or plaintiff and any defendant may have the issues joined tried by a special jury upon procuring such special jury to be struck and summoned for the day on which the trial of such case is to be had and the jury so struck shall be the jury returned for the trial of the issues.

Notice to opposite party.

(2) The party desiring the special jury shall give notice in writing thereof to the opposite party, after the close of the pleadings and at least eight days before the first day of the sittings at which the case is to be tried.

Order for special jury.

(3) Upon the application of any party, the Court or a Judge may at any time make an order for a special jury upon such terms as to costs and otherwise as may be deemed just.

(4) Where notice has been given to try by special jury, either party may, at least six days before the first day of the sittings at which the case is to be tried, give notice to the sheriff that the case is to be tried by a special jury, and if no such notice is given no special jury need be struck or summoned, and the case may be tried by a common jury, unless otherwise ordered by the Court or a Judge.

(5) The sheriff shall thereupon in writing appoint some convenient day and hour for striking the special jury, sufficiently distant to enable the party requiring the special jury to give notice to the opposite party, and the party requiring same shall serve a copy of such appointment upon the opposite party of his solicitor four clear days before the day so appointed, and in default thereof, the sheriff shall not proceed to strike the special jury.

(6) If a party does not attend, in person or by solicitor, at the striking of the special jury, the sheriff, upon proof of service of the appointment, and after waiting half an hour for the absent party, shall, if requested by the other party, or his solicitor, proceed to strike the special jury, and in case of the continued absence of such first mentioned party, the sheriff shall, on his behalf, strike off the list the twelve names which such party is entitled to strike off the list as hereinafter provided.

79. A special jury shall, except as hereinafter provided, consist of persons whose names appear on the roll of grand jurors for the High Court or on the roll of grand jurors for the inferior Courts for the year in which the notice to the sheriff is given.

84. The party who gives notice to the sheriff for a special jury, or the party who upon his default has requested the sheriff to proceed under subsection 6 of section 78, shall pay the fees for striking such special jury, the fees of the jurors and all the expenses occasioned by the trial by the special jury, and shall not have any further or other allowance for the same upon taxation of costs than if the case had been tried by a common jury, unless the trial Judge certifies in open Court, immediately after the verdict, or afterwards upon notice at Chambers, that the case was proper to be tried by a special jury.

The fact that a member of a special jury was one of the jurors at a former trial is a good ground of challenge at a new trial, but the fact that such a juror served without challenge is not *per se* a

Compare

R. S. B. C., c. 107, ss. 55 to 64.

R. S. Man., c. 92, ss. 60 to 67.

R. S. N. B., c. 126, ss. 35 to 42.

R. S. N. S., c. 162, s. 62.

Ord. N. W. T., c. 28, ss. 17 and 18.

ground for granting a new trial:—Held, that in selecting a special jury it was the duty of the solicitor to ascertain any grounds of challenge, an opportunity to do which is provided: *Harris v. Duns-muir*, 9 Brit. Col. L. R. 303.

Where a defendant applies for a special jury he must do so in time to permit of the jurors being summoned, otherwise the common jury will not be held to be superseded: *Clandinan v. Dickson*, 8 U. C. R. 281, 9 U. C. R. 266. There must be four clear days' notice of striking a special jury; therefore a notice given after 11 a.m. on Saturday for 11 a.m. on Tuesday is not sufficient: *Bell v. Flintoft*, 3 U. C. R. 122. R. S. O. 1897, c. 61, s. 117, requires four full days. If a special jury be struck previous to an assize, and the cause is irregularly tried at that assize by a common jury, and the verdict afterwards set aside, it is irregular to try the cause a second time by a common jury, no new special jury being struck: *McMartin v. Powell*, T. T. 3 & 4 Vict. An application for a certificate for a special jury must be made immediately after the trial: *Binkley v. Dejardine*, Tay. 177. The trial Judge certified for the defendant's costs of a special jury summoned at his instance: *Farquhar v. Robertson*, 13 P. R. 156. An application for a special jury may be made in chambers, but is more proper before the assize Judge. It is not necessary to give any reason for requiring a special jury. A plaintiff may obtain an order for a special jury *ex parte*. A defendant shall move upon summons, but not necessarily before entry of the record: *The Molsons Bank v. Robertson*, 5 M. L. R. 343 (Man.).

EVIDENCE AT TRIALS.

MODE IN WHICH EVIDENCE MUST BE GIVEN.

The Consolidated Rules of Practice provide as follows:—*

483. In the absence of an agreement between the parties and subject to these rules, the witnesses at the trial of an action or at

* Con. Rule, 483.

Compare

B. C. Rule, 365.

Man., c. 40, Rule 462.

N. S. Rules, Order XXXV., s. 1.

N. W. T., c. 21, Order 26, s. 263.

Con. Rule, 484.

Compare

B. C., none.

Man., c. 40, Rule 463.

N. S. Rules, Order XXXIV., s. 37.

N. W. T., none.

an assessment of damages shall be examined *ex vivo* and in open Evidence Court, but the Court or a Judge of the High Court may at any time ^{on trial or in a case} for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial on such conditions as may seem just, or that any witness whose attendance ought for some sufficient cause to be dispensed with be examined before an examiner; but where the other party *bona fide* desires the production of a witness for cross-examination, and such witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit.

484. All witnesses in any matter pending before a master or Evidence referee shall give their testimony *viva voce* before the master or before a referee, unless it is otherwise ordered by the master or referee, or by Master or Referee the Court or a Judge on special grounds, or unless with the consent of the parties.

485. (1) The Court or a Judge may, in any cause or matter Deposi- where it appears necessary for the purposes of justice, make an order for the examination upon oath before an officer of the Court, or any other person and at any place, of any person; and may order any deposition so taken to be filed in the Court, and may empower any party to the cause or matter to give such deposition in evidence therein on such terms as may seem just.

(2) Such examination shall, unless otherwise ordered, be conducted in accordance with the practice upon examinations for discovery in so far as the same is applicable.

Con. Rule, 485.

Compare

B. C. Rule, 368.

N. S. Rules, Order XXXV., s. 3A.

Man., c. 40, Rule 464.

N. W. T., c. 21, Order 26, s. 267.

Con. Rule, 486.

Compare

B. C., none.

N. S., none.

Man., none.

N. W. T., c. 21, Order 26, s. 280.

Con. Rule, 487.

Compare

B. C. R., 306.

N. S. Rules, Order LXIV., s. 2.

Man., c. 40, Rule 472.

N. W. T., none.

Con. Rule, 488.

Compare

B. C. R., 359.

N. S. Rules, Order XXXIV., 560.

Man., c. 40, Rule 471.

N. W. T., none.

Copies of depositions certified by person taking the same, admissible in evidence

486. Where an examination of a party or witness has been taken before a Judge of the High Court, or of a County Court, or before another officer or person appointed to take the same, copies of such examinations and depositions certified under the hand of the Judge, officer or other person taking the same, shall without proof of his signature be received and read in evidence saving all just exceptions.

Evidence of service of notice to produce. Libel or slander, particulars of evidence in mitigation.

487. Service of a notice to produce may be proved by an affidavit of the solicitor in the cause or his clerk.

488. In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, he shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published or as to the character of the plaintiff without the leave of the Judge, unless seven days at least before the trial he furnishes particulars in writing to the plaintiff of the matters as to which he intends to give evidence.

SECURING ATTENDANCE OF WITNESSES.

The process to compel the attendance of witnesses is the writ of *subpœna ad testificandum*: *Edgell v. Curling*, 7 M. & Gr. 958. Either the writ or a copy of it must be personally served on the witness; and where a copy only is delivered the original must be shewn whether the witness requires it or not; otherwise he cannot be attached: *Wadsworth v. Marshall*, 1 C. R. & M. 87. It must be served so as to give witnesses "reasonable time to put their own affairs in such order that their attendance may be with as little prejudice to themselves as possible:" *Hammond v. Stewart*, 1 Stra. 510; but urgent domestic business is no excuse for disobedience: *Goff v. Mills*, 2 D. & L. 23. Where the person is present in or attending near the Court, service on the day of trial may be sufficient under the circumstances: *Maunsell v. Ainsworth*, 8 Dowl. 869. Whether the service be sufficient is for the Judge, not the jury: *Barber v. Wood*, 2 M. & Rob. 172. If the cause be made a *remanet* the *subpœna* must be resealed and re-served: *Sydenham v. Rand*, 3 Doug. 429. Though the writ only requires attendance on the commission day, the witness must attend for the whole assizes till the case comes on: *Scholes v. Hilton*, 10 M. & W. 15. Although as a general rule a writ of *subpœna* may be served at any stage of the proceedings in an action, yet service at a time when, to the knowledge of the parties, the action cannot possibly be tried during the current sittings amounts to an abuse of the process of the Court, and ought to be set aside: *London and Globe Finance Corporation v. Kaufman*, 69 L. J. Ch. 196; 48 W. R. 458. A witness in a civil suit is not bound to attend unless the reasonable expenses of going to and returning from the place of trial, and of his stay there, are tendered to him at the

time of serving the *subpœna*; nor if he appears is he bound to give Public evidence before such expenses are paid or tendered. By Con. Rule, officers not 1897, 1151, a public official or other witness subpoenaed or called upon to produce before the Court or a Judge or officer any public or other document, is not entitled to more than ordinary witness fees unless the Court or Judge or officer otherwise orders. The allowance to witnesses is regulated by the following items of the tariff B. annexed to Con. Rule, 1897:— *

ALLOWANCE TO WITNESSES.	Higher Scale. High Court and Court of Appeal.	County Courts.
117. To witnesses residing within three miles of the Court House, per diem.....	\$1 00	\$1 00
118. To witnesses residing over three miles from the Court House.....	1 25	1 25
119. Barristers and solicitors, physicians and surgeons, other than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem.....	4 00	4 00
120. Engineers, surveyors, and architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem.....	4 00	4 00

121. If witnesses attend in one case only they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

122. The travelling expenses of witnesses over three miles shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile one way.

Section 16 of Ontario Evidence Act is as follows:—

16. A witness served in due time with a *subpœna* issued out of any Court in Ontario and paid his proper witness fees and conduct money who shall make default in obeying such *subpœna* without any lawful and reasonable impediment, shall in addition to any penalty he may incur as for a contempt of Court, be liable to an action on the part of the person by whom, or on whose behalf, he shall have been subpœnaed, for any damage which such person may sustain or be put to by reason of such default.

* N. S., c. 185 (Supreme Ct. tariff).

Subpœnas.

The Consolidated Rules provide as follows:—

Subpœnas. 478. A writ of *subpœna* shall bear date upon the day when the same are (sic) issued.

Subpœna to produce original record not to issue without order. 479. A *subpœna* for the production of an original record or of an original memorial from any registry office shall not be issued unless the order of the Court or a Judge is produced to and filed with the officer issuing the same, and the writ shall conform to the description of the document in the order.

Any number of *subpœnas* may be included in one. 480. Any number of names may be included in one *subpœna*, and no more than one *subpœna* shall be allowed on taxation of costs unless a sufficient reason be established to the satisfaction of the taxing officer for issuing more than one.

Subpœna calling opposite party. 481. Wherever a party desires to call the opposite party as a witness at the hearing or trial, he shall either *subpœna* such party, or in case such party is within the jurisdiction, give him or his solicitor at least eight days notice of the intention to examine him as a witness in the cause, paying at the same time the amount proper for conduct money; and if such party does not attend on such notice or *subpœna*, such non-attendance shall be taken as an admission *pro confesso* against him in any such action, unless otherwise ordered by the Court or Judge in which or before whom such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be non-suited, or the proceedings in the action may be postponed by the Court or Judge on such terms as the Court or Judge sees fit to impose.

warrants. 482. (1) Upon proof, to the satisfaction of the Judge presiding at the sittings of any Court, of the service of a *subpœna* upon any witness who fails to attend, or to remain in attendance in accordance with the requirements of the *subpœna*, and that a sufficient sum for his fees as a witness had been duly paid or tendered to him, and that the presence of such witness is material to the ends of justice, the said Judge may by his warrant directed to any sheriff or other officer of the Court, or to any constable, cause such witness to be apprehended and forthwith brought before him or any other Judge who may thereafter preside at such sittings, to give evidence; and in order to secure his presence as a witness, such witness may be taken on such warrant before the presiding Judge, and detained in the custody of the person to whom the warrant is directed, or otherwise, as the presiding Judge may order, until his presence as such witness is required, or in the discretion of the said Judge he may be released on a recognizance (with or without sureties) conditioned for his appearance to give evidence.

(2) The warrant may be according to Form No. 93, and may be executed in any part of Ontario.

Where after close of plaintiff's case he is allowed to examine the defendant, this does not re-open the matter so as to entitle him to call other witnesses: *Wilkes v. Heaton*, 17 U. C. R. 95. A party calling the opposite party as a witness, makes him his witness to all intents and purposes: *Dunbar v. Meek*, 32 U. C. C. P. 195. When a party to a suit calls the opposite party he is not necessarily concluded by his answers: *Mair v. Cully*, 10 U. C. R. 321.

Issue of Subpoenas into Any Part of Ontario or Quebec.

Sections 4-11 and 13 of C. S. C. c. 79 are not consolidated in the Revised Statutes of Canada and are as follows:

4. If in any action or suit depending in any of Her Majesty's Courts Superior Courts of Law or Equity in Canada, it appears to the Court, ^{under 1880s} or when not sitting, it appears to any Judge of the Court, ^{subpoena} that it is to any part ^{of Canada} proper to compel the personal attendance at any trial, or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his discretion, may order that a writ

Con. R., 478.

Compare

B. C., none.

N. S., none.

Man., c. 40, rule 457.

N. W. T.

Con. R., 480.

Compare

B. C. Rules, 392 and 393.

N. S. Rules, Order XXXV., s. 29.

R. S. Man., c. 40, Rule 458. N. W. T.

Con. R. 481.

Compare

R. S. Man., c. 40, Rule 459.

N. S., none.

B. C., none.

N. W. T.

Con. R., 482.

Compare

B. C., none.

N. S., none.

R. S. Man., c. 40, Rule 460.

N. W. T.

R. S. O. c. 73, s. 16, is omitted in Ont. Evidence Act of 1909, being identical with C. R. 481.

called a writ of *subpœna ad testificandum* or of *subpœna duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he may be in Canada.

Service thereof in any part of Canada to be good. 5. The service of any such writ or process in any part of Canada shall be as valid and effectual, to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court.

When not to be issued. 6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside.

Writs to be specially noted. 7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order.

Consequences of disobedience. 8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued may, upon proof made of the service thereof, and of such default, to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of *subpœna* or other similar process issued out of such last mentioned Court.

If expenses paid or tendered. 9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquête* or examination of witnesses, in obedience to any such *subpœna* or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Courts of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of *subpœna*, or other similar process, was served upon him.

How service proved in Lower Canada. 10. The service of such writs of *subpœna* or other similar process shall be proved by the certificate of a bailiff within the jurisdiction where the service has been made, under his oath of office, and such service in Upper Canada by the affidavit of service

endorsed on or annexed to such writ by the person who served the same.

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses, unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders. Costs of attendance provided for.

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court. Power to issue commissions to examine witnesses preserved.

Held, that looking at the object of the Act and the propriety of its application to the examination of parties, the term "witness" in section 4 should be used in its widest sense, and should include parties to the cause as well as witnesses in the ordinary sense of the word: *Moffatt v. Prentice*, 9 C. L. J. 159. The Court has authority to grant an order for a *subpœna* to issue to Lower Canada, though the evidence of the proposed witness is not intended to be used at the hearing of the cause: *McKerchie v. Montgomery*, 1 Ch. Ch. 225. Before a *subpœna* will be issued to the province of Quebec it is necessary to shew that no suit is pending in that province for the same cause of action: *McPherson v. McPherson*, 3 Ch. Ch. 58.

PRACTICE AS TO WITNESSES.

Where a witness has come to and stayed at the assizes on *subpœna* without requiring payment, he may refuse to appear till payment of the expenses of returning: *Newton v. Harland*, 1 M. & G. 956. A party who is a necessary or material witness in his own cause, and who attends the trial only for that reason, may be entitled to his expenses like any other witness: *Dowdell v. Australian Mail Co.*, 3 E. & B. 902; but if about to attend on his own account he is not entitled to conduct money when *subpœnaed* by the other side: *Reid v. Fairless*, 3 F. & F. 958. Before the jury are sworn the counsel of the party may have an absent witness called on his *subpœna*: *Hopper v. Smith*, M. & M. 115. This course when adopted by the plaintiff avoids the additional expense of a non-suit if the Judge will allow the plaintiff to withdraw the record under Con. Rule 1897, 430 (4): *Mulett v. Hunt*, 1 C. R. & M. 752. But it is not absolutely necessary to call a witness on his *subpœna* in order to entitle the party to proceed against him: *Lamont v. Crook*, 6 M. & W. 615; *Goff v. Mills*, 2 D. & L. 23. If the witness is in custody his attendance must be produced by a writ of *habeas corpus ad testificandum*. A *habeas corpus* also lies to bring the witness from a lunatic asylum on an affidavit that he is fit for examination and not dangerous:

Fennell v. Tait, 1 C. M. & R. 584. Where the affidavit of service did not state that the original *subpœna* had been shewn to the witness:—Held, that attachment would not lie though the witness attended several days before the trial and was paid: *Corporation of East Nissouri v. Cogswell*, 2 P. R. 385. A witness served with a *subpœna duces* is bound to bring into Court any document proved to be in his possession, though he may have a valid excuse for not shewing it in evidence; and the validity of the excuse is matter for the judgment of the Court and not of the witness: *Amey v. Long*, 9 East. 73. The Court will excuse production if the disclosure would subject the party to a criminal charge or penalty: *Whitaker v. Izod*, 2 Taunt. 115; but not unless the party from whom disclosure is sought will pledge his oath that to the best of his belief the production would tend to criminate him: *Webb v. East*, 5 Ex. D. 108, C. A. With these exceptions no document relevant to the issue or being a title deed is privileged from disclosure, unless it be a confidential communication professionally made between counsel or solicitor and client, or information obtained by the solicitor or an agent employed by him or by the client on his recommendation: *Bustros v. White*, 1 Q. B. D. 423, C. A.; or information obtained by the client for the purpose of obtaining the opinion of the solicitor thereon, and although the purpose was not carried out: *Southwark & Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315 C. A. Confidential communications between solicitor and client are privileged, though made before any litigation was in contemplation: *Minet v. Morgan*, L. R. 8 C. P. 361; but communications obtained by the solicitor from third persons are not privileged unless prepared confidentially after a dispute has arisen for purposes of obtaining information, evidence or legal advice, with reference to litigation existing or contemplated between the parties: *Wheeler v. Le Marchant*, 17 Ch. D. 675 C. A. Where the witness declines to produce an instrument on the ground of professional confidence, the Judge should not inspect it to see whether it was one which he ought to withhold: *Volant v. Soyer*, 13 C. B. 231; and it seems that a mere assertion on oath by the solicitor that it is a title deed or other privileged document is conclusive: *S. C.*; and if the document is brought into Court by a witness who says he is instructed by the owner to object to the production of it, this is enough to justify secondary proof without subpœnaing the owner himself to make the objection in person: *Phelps v. Prew*, 3 E. & B. 430. When the production is excused secondary evidence is admissible: *Marsden v. Downes*, 1 Ad. & E. 31. If the solicitor produced his client's deeds without objection, the evidence is admissible: see *Hibberd v. Knight*, 2 Exch. 11. The witness is not entitled to have his liability to produce argued by counsel: *Doe d. Rowcliffe v. Egremont*, 2 M. & Rob. 386.

A person merely subpoenaed to produce and not to testify need not be sworn: *Perry v. Gibson*, 1 Ad. & E. 48; and if sworn by mistake he is not liable to cross-examination: *Rush v. Smith*, 1 C. M. & R. 94. So if a wrong witness is called in consequence of a mistake in his name and is dismissed, on the discovery of the mistake, the other side has no right to cross-examine him: *Clifford v. Hunter*, 3 C. & P. 16. So if he is called by error of the counsel and actually sworn, yet if dismissed before examination, he is not liable to be cross-examined: *Wood v. Mackinson*, 2 M. & Rob. 273. A witness or a party is not obliged to attend and give evidence or submit to cross-examination unless he be duly notified or subpoenaed, even if he happen to be present when the proceedings are going on: *Robins v. Carson*, 2 Ch. Ch. 343. A proper sum for his expenses should be tendered to the party with the notice: *Street v. Faulkner*, 15 U. C. R. 116. A plaintiff or defendant called as a witness under 16 Vict. c. 19 is not entitled to any other notice, or to be subpoenaed differently from any other witness: *Nash v. Bush*, 5 U. C. C. P. 300.

An arbitrator may be examined as a witness upon a motion to set aside an award, or in an action upon an award, but such examination must be limited to matters of fact arising in connection with the reference and award, and cannot be pressed to the length of asking the grounds and reasons for making the award: *In re Christie and Toronto Junction*, 22 A. R. 21. When a witness is subpoenaed to attend on a particular day, and not from day to day, he cannot be attached if he were present on that day but went away afterwards: *Rainville v. Powell*, 3 U. C. R. 128. Where a person who had given evidence in an action at law between substantially the same persons as were the parties to this suit, was afterwards committed to the provincial penitentiary, and refused to be examined in this cause, the Court ordered his evidence to be read from the notes of the Judge who had tried the action at law: *Switzer v. Boulton*, 2 Chy. 693. Assumpsit for work and labour: The plaintiff's witness swore that the work was done upon a written agreement which he had in Court but refused to produce. He had not been subpoenaed:—Held, that he was as much bound to produce the writing as if in attendance under a *subpœna duces tecum*. But *semble*, that if the witness had been required by the Court to produce the agreement, and had still refused, this would not have been sufficient to warrant the reception of secondary evidence: *Farley v. Graham*, 9 U. C. R. 438. Where on a second trial it appears that a witness who was examined at the first trial is absent from the country, his evidence then given may be received: *Sutor v. McLean*, 18 U. C. R. 490.

Whether due diligence has been used to discover an attesting witness must depend on the circumstances of the case: *Crane v. Ayre*, 2 AB. 577 (N.B.).

Where it is sought to give in evidence at the trial of an action oral testimony taken under oath in another judicial proceeding, in which the adverse party had the power to cross-examine, on the ground that the witness cannot be called as being beyond the jurisdiction of the Court or otherwise, it is sufficient to shew that after diligent search the witness cannot be found.

Answers to enquiries made as to his whereabouts are admissible to prove an unsuccessful search for a witness, and are not for that purpose to be treated as hearsay evidence.

Munro v. Toronto Railway Co. (1904), 9 O. L. R. 299, at p. 312, distinguished.

Cuff v. Frazee Storage and Cartage Co., 14 O. L. R. 263.

FOREIGN COMMISSIONS TO TAKE EVIDENCE.

The Evidence Act provides as follows:— *

Witnesses may be ordered to be examined in relation to any matter pending before a foreign tribunal.

50. (1) Where it is made to appear to the High Court or a Judge thereof, or to a Judge of a County or District Court, that any Court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, the obtaining of the testimony in or in relation to any action, suit or proceeding pending in or before such foreign Court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the Court or Judge so applied to, such Court or Judge may order the examination of such witness before the person appointed, and in the manner and form directed, by the commission, order or other process; and may by the same or by a subsequent order, command the attendance of any person named therein for the purpose of being examined, or the production of any writing or other document or thing mentioned in the order; and may give all such directions as to the time and place of the examination, and all other matters connected therewith, as may seem proper; and the order may be enforced, and any disobedience thereto punished, in like manner as in case of an order made by the same Court or Judge in an action depending in such Court or before such Judge.

Payment of expenses of witness.

(2) A person whose attendance is so ordered shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the High Court.

* Compare

R. S. B. C., c. 71, ss. 42 and 43.

R. S. Man., c. 57, ss. 57, 58, 59 and 60.

R. S. N. B., c. 127, ss. 23 and 24.

R. S. N. S., c. 163, s. 51.

(3) A person examined under such commission order or other process shall have the like right to object to answer questions tending to criminate himself, and to refuse to answer any questions which, in an action pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer; and no person shall be compelled to produce at the examination, any writing, document or thing which he would not be compellable to produce at the trial of such an action.

(4) Where the commission order or other process or the instructions of the Court accompanying the same direct, that the person to be examined shall be sworn or shall affirm, the person so appointed shall have authority to administer the oath to him or to take his affirmation.

WHAT CASES MUST BE TRIED BY JURY.

The present regulations as to manner of trial are contained in sections 102-110, inclusive, of the Judicature Act, R. S. O. 1897, c. 51. These rules are as follows:

102. In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, all questions which might prior to the Administration of Justice Act, 1873, have been tried by a jury, shall be tried by a jury unless the parties in person or by their solicitors or counsel waive such trial.

103. Subject to rules of Court, all causes, matters and issues, over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered.

104. All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks, shall be tried by a Judge without a jury, and the trial shall take place in the county in which the road, street or sidewalk is situated.

Section 104b added by Subsection 1 of Section 7 of Chapter 20, Ontario Acts, 1910:—

104b. In any action brought to recover damages or other compensation for or in respect of bodily injury sustained by any person, the Court or a Judge or any person who, by consent of parties or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation is sought shall submit to be examined by a duly qualified medical practitioner who is not a witness on either side,

and may make such order respecting such examination and the costs thereof as he may think fit. The medical practitioner named in such order shall be selected by the Court or Judge making the order, and may afterwards be a witness on the trial unless the Judge before whom the action is tried otherwise directs.

Other issues to be tried and damages assessed by Judge alone.

105. Subject to rules of Court, all causes, matters and issues other than as aforesaid, and the assessment or enquiry of damages therein may, and (subject to the provisions of section 110) in the absence of such notice as in the next section mentioned, shall be heard, tried and assessed by a Judge without a jury.

Unless jury notice given or Court or Judge otherwise directs.

106. If any of the parties desires the issues of fact to be tried or damages to be assessed or enquired of by a jury, he shall at any stage of the proceedings, but not later than the fourth day after the close of the pleadings, or in case notice of trial is served before that time, then within two days after service of notice of trial, or within such other time as may be ordered by the Court or a Judge, file and serve on the opposite party a notice in writing requiring that the issues should be tried, or the damages assessed by a jury, and a copy or the notice shall be attached to the record or certified copy of the pleadings prepared for the Judge.

Effect of notice requiring a jury.

107. (1) Where any one of the parties has given such notice requiring a jury, the issues of fact shall (subject to the provisions of section 110) be tried and determined or the damages assessed by the verdict of jurors duly sworn for the trial of such issues or for the assessment of such damages.

Parties may waive notice.

(2) The parties present at the trial may consent that the said notice requiring a jury shall be waived, and the case tried and damages assessed by the Judge, and may endorse a memorandum of such consent upon the record, and thereupon the Judge may try the issues or assess the damages without a jury.

Agreement of ten jurors in verdict or answers to the questions.

108. (1) In all civil cases in the High Court of Justice or in a County Court, or in any matter or cause within the jurisdiction of the Provincial Legislature, where issues are tried or where damages are assessed by a jury, it shall be sufficient if ten of the jurors empanelled for the trial or assessment shall agree, instead of twelve;

R. S. O., c. 51, s. 102-110.

Compare

R. S. B. C., none.

R. S. Man., c. 40, s. 59, 60, 61, 63.

R. S. N. B., none.

R. S. N. S., c. 155, s. 41 to 44.

Ord. N. W. T., c. 21, s. 170.

and in such case ten jurors may give the verdict, or answer the questions submitted to the jury by the Judge.

(2) A verdict rendered or question answered under the provisions of this section shall have the same effect as the verdict or answer given by twelve jurors.

(3) This section shall apply to special juries.

109. If at the trial of any action or issue or assessment of damages, a juror should die or become incapacitated by illness or any other cause from continuing to sit or act on the jury, or if it should be discovered that one of the jury sworn has an interest in the result of the suit, or is a relative of any of the parties thereto within the degree of first cousin, the presiding Judge may discharge such juror, and may in any such case direct that the trial or assessment shall proceed on such terms as he thinks fit with eleven jurors, and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the Judge.

110. Notwithstanding anything in sections 106 and 107 contained, the Judge presiding at the trial may in his discretion direct that the action or issues shall be tried or the damages assessed by a jury; and upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without a jury.

The Judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised: *Marks v. Town of Windsor*, 17 O. R. 719. See *Adair v. Wade*, 9 O. R. 15; *Denmark v. McConaghey*, 29 U. C. C. P. 563. The power conferred on the Court by Rule 615 to give judgment on the evidence before it, may be exercised though the result be to disregard the finding of a jury, but it must be used with great caution: *Clayton v. Patterson*, 32 O. R. 435. When in an action tried with a jury the presiding Judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot upon the jury disagreeing himself decide under Rule 780 in the defendant's favour upon his own view of the evidence. Judgment in 30 O. R. 625, affirmed: *Ullrich v. Michigan Central R. W. Co.*, 27 A. R. 122. The trial Judge has by section 255 of the Common Law Procedure Act a discretion to try any case with or without a jury as he may think best, and his discretion will not be interfered with by a Divisional Court: *Brown v. Wood*, 12 P. R. 198. Where the trial Judge has seen and heard the witnesses, and there is evidence to support his findings, they will not be interfered with upon appeal: See cases collected, Cont. Dig., p. 608. Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood

the evidence, notwithstanding that the trial Judge was dissatisfied with the verdict: *Fraser v. Drew*, 30 S. C. R. 241. When questions of fact have been properly left to a jury their findings thereon must be accepted by a Court of Appeal: *Balch & Peppard v. Rombough*, C. S. C., 12th June, 1900. It is no ground for setting aside a verdict that the Judge gave his opinion on the facts to the jury, and recommended them to give small damages: *French v. Wallace*, James 337 (N.S.). Wherever the jury decide against or without evidence, the Court will exercise its right to control them in order that justice may be done: *Cox v. Witt*, 2 N. S. D. 25 (N.S.).

REFUSAL TO PROCEED.

Where the plaintiff declines to proceed at the trial, judgment will be given under rule 546 dismissing the action: *Robinson v. Chadwick*, 7 Ch. D. 878. Where one party appears but the opposite party does not appear, the former may proceed and obtain judgment without proving service of notice of trial: *James v. Crow*, 7 Ch. D. 410.

POSTPONEMENT.

The Consolidated Rules, 1897, provide:—*

Adjourn-
ment of
trial.

553. The Judge may postpone or adjourn the trial—

Where the ground of an application to put off a trial is the absence of a witness, it is not sufficient to shew that the witness is material, and may and probably will give important evidence, or to swear that his evidence will be material and necessary without shewing that it will assist the case of the person making the application: *Kerr v. Grand Trunk R. W. Co.*, 4 P. R. 303. Held, that the inability properly to calculate the damage to the plaintiff from a personal injury owing to a sufficient time not having elapsed from the receipt of the injury is a sufficient ground for postponing the trial: *Speers v. Great Western R. W. Co.*, 6 P. R. 170. At the trial the Judge having declined to allow a witness twice called in the process of the suit to be recalled, or to wait for the possible arrival of another witness, the Court refused to review the exercise of his discretion in so doing: *Gleason v. Williams*, 27 U. C. C. P. 93. Action for extra labour on an agreement to plaster defendant's house. The Court, although not seeing that the verdict was against the evidence, or weight of evidence, granted a new trial on the ground that the

* Compare

B. C. Rules, 356 and 361.

R. S. Man., c. 40, s. 567 and 568.

N. B.

N. S. Rules, Order XXXIV., s. 25.

N. W. T.

case was taken late at night, the defendant further shewing by affidavits that he had not time to go into his defence as fully as he would if time had permitted: *Gallina v. Colton*, 6 U. C. C. P. 247. The affidavit for a continuance on the ground of the absence of a material witness ought to shew when he is expected to return: *Ducaen v. Dunne*, 2 Thom. 13 (N.S.). Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will as a general rule be costs in the cause. In all other cases the costs will be disposed of according to circumstances and in the discretion of the Judge: *Pattison v. McNabb*, 12 Chy. 483. The costs of moving to postpone a trial on account of the absence of a material witness will be costs in the cause where the party moving has made diligent efforts, etc., to secure the attendance: *Brown v. Porter*, *Knox v. Porter*, 11 P. R. 250. In some cases an application on affidavit may be made to put off the trial on account of the absence of a material witness. An application to put off the trial beyond the existing sittings or from sittings to sittings was not generally allowed on the part of the plaintiff because he might at any time withdraw the record if he was not prepared to try: *Ansley v. Birch*, 3 Camp. 333. As now by Con. Rule, 1897, the plaintiff cannot withdraw the record without the leave of the Court or the Judge, this reason to some extent fails. When a motion is about to be made to the Judge at *nisi prius* for putting off the trial on account of the absence of a witness, notice should at first be given to the opposite solicitor, with a copy of the affidavit intended to be used in support thereof. Where expenses have been incurred by the other party in bringing up witnesses the application will only be granted on the terms of paying them. No affidavit of merits is required: *Hill v. Prosser*, 3 Dowl. 704. The affidavit may be made by the party or by his solicitor: *Duberly v. Gunning*, Peake, 97; or by the solicitor's clerk if he has the management of the case: *Sullivan v. McGill*, 1 H. Bl. 637.

COMPETENCY OF WITNESSES.

The Ontario Evidence Act provides as follows:— *

4. No person offered as a witness in an action shall be excluded by reason of any alleged incapacity from crime or interest from giving evidence.

Witnesses not to be incapacitated by crime or interest.

* Compare

- R. S. B. C., c. 71, ss. 4, 5, 6 and 24.
- R. S. Man., c. 57, ss. 3, 4 and 5.
- R. S. N. B., c. 127, ss. 3, 4, 8, 9 and 11.
- R. S. N. S., c. 163, ss. 34, 35, 37, 36, 38.

Such per-
sons ad-
mitted to
give
evidence

5. Every person offered as a witness shall be admitted to give evidence notwithstanding that he has an interest in the matter in question or in the event of the action, and notwithstanding that he has been previously convicted of a crime or offence.

Evidence
of parties.

6. The parties to an action, and the persons on whose behalf the same is brought, instituted, opposed or defended, shall, except as hereinafter otherwise provided, be competent and compellable to give evidence, on behalf of themselves or of any of the parties; and the husbands and wives of such parties and persons shall, except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of any of the parties.

Evidence
in proceed-
ings in
conse-
quence of
adultery.

8. The parties to an action or proceeding instituted in consequence of adultery, and their husbands and wives, shall be competent but not compellable to give evidence, but the husband or wife, if competent only under this Act, shall not be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same action or proceeding in disproof of his or her alleged adultery.

Communi-
cations
made
during
marriage.

9. A husband shall not be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage.

In the Evidence Act by section 2:—

Interpre-
tation
“Court.”

“Court” shall include a Judge, Arbitrator, Umpire, Commissioner, Police Magistrate, Justice of the Peace or other officer or person having by law or by the consent of parties authority to hear, receive and examine evidence.

“Action.”

“Action” shall include an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a Statute of Ontario or against a by-law or regulation made under the authority of any such statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a Court under the law of Ontario.

By section 3:—

Applica-
tion of
Act.

3. This Act shall extend and apply to the evidence offered or taken orally or by interrogatories or affidavits or by the production of documents or things or otherwise by or before a Court in an action.

Evidence in proceedings on municipal by-laws is provided for in Ontario by sections 711-712 of the Municipal Act.*

* Ont. Stat. 1903, c. 19, ss. 711 and 712.

Compare

R. S. Man., c. 116, ss. 786 and 788.

R. S. N. B., c. 165, ss. 117 and 118.

711. Upon the hearing of any information or complaint exhibited ^{Who may} or made under this Act, and upon any prosecution for an offence ^{be wit-} against any by-law passed by a municipal council, or by a board of commissioners of police under the authority of this Act, the person exhibiting or making the information or complaint shall be a competent witness, notwithstanding such person may be entitled to part of the pecuniary penalty on the conviction of the offender, and the defendant and the wife or husband of such persons opposing or defending shall also be competent witnesses, and all the said persons shall be compellable to give evidence on the hearing.

712. In prosecuting under any by-law, or for the breach of any ^{Compell-} by-law, witnesses may be compelled to attend and give evidence in ^{ing wit-} the same manner and by the same process as witnesses are compelled ^{nesses to} attend, to attend and give evidence on summary proceedings before justices of ^{etc.} the peace in cases tried summarily under the "Ontario Summary Convictions Act."

A person under sentence of death is not a competent witness: *Regina v. Webb*, 11 Cox. 133, followed: *Graeme v. Globe Printing Co.*, 10 C. L. T. Occ. N. 367. Right of witness to presence of counsel upon examination under Con. Rule 576: see *Dominion Bank v. Bell*, 13 P. R. 471. Held, upon a review of the authorities, that the depositions of the defendant taken on his own behalf upon a reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the reference prior to the cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him: *Randall v. Atkinson*, 30 O. R. 242.

C. sued M. and R., M. accepted service and acknowledged amount due, but R. pleaded to the action. Before trial defendants died. Then C. R. & R. R., as administrators of R., were, before trial, made parties to the action. At the trial C. was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased M. and R., the learned Judge ruled that the evidence was inadmissible under s. 41, c. 96 of the Revised Statutes of Nova Scotia, 4th series:—Held, that under said section in an action against administrators made parties to an action after issue joined, but before trial, the plaintiff cannot give any evidence in his own favour of dealings with a deceased defendant: *Chesley v. Murdock*, 2 S. C. R. 48.

DISQUALIFICATION OF WITNESSES.

A person whose understanding is manifestly and egregiously defective will not be allowed to give evidence. This defect may arise from immaturity of intellect or some

species of insanity. Such a witness would not be competent because his mental power of distinguishing and relating the truth could not be relied on. As a general rule insane persons, idiots and lunatics, during their lunacy are incompetent witnesses. But lunatics in their lucid intervals are competent. It may be observed that here the question of competency will always turn solely on whether or no the witness will be likely to give truthful evidence, and if he is likely to give this, he may be received notwithstanding considerable defects of intellect or even aberration of mind on certain subjects: *R. v. Hill*, 20 L. J. M. C. 222. It makes no difference whether the defect of understanding arises from imperfect education, from natural imbecility, or from failure of the mental powers. It is for the Judge by examination of the lunatic on the *voir dire*, and of witnesses called for that purpose, to ascertain and decide on his competency, and if the Judge allow him to give evidence the jury must decide on the credit to be attached to his testimony: *S. C., Id.* Deaf and dumb persons were formerly presumed to have understandings so defective as to be in all cases incompetent, a presumption entirely contrary to experience, and one not likely now to be made: see *Harrod v. Harrod*, 1 K. & J. 9. The state of the intellect of such a witness might, of course, be reasonably inquired into before taking his testimony, as the usual channels of information being cut off the education of such persons is more than usually difficult: see 2 Taylor *Evid.*, s. 1241. **A deaf and dumb person may give evidence through an interpreter by signs: *Ruston's Case*, 1 Leach C. C. 4th ed., 408; or by writing: *Morrison v. Lenard*, 3 C. & P. 127.** Where such a person has been examined on the *voir dire* and pronounced to be a competent witness, and it afterwards appears during the examination-in-chief that the witness is incompetent, his evidence may be withdrawn from the jury: *R. v. Whitehead*, L. R. 1 C. C. 33.

Children not able to apprehend the obligation of an oath or promise cannot be examined; but tender age alone is no objection: *Brazier's Case*, 1 East. P. C. 443. And a child who was wholly destitute of religious education has been allowed to be made a competent witness by being taught the nature of an oath before the trial, with a view to qualify him: *R. v. Murphy*, 1 Leach 430 n.; where a child is tendered as a witness the practice is for the Judge to examine him with a view to ascertain his competency. It is evident that in any of the above cases **if a witness who has been examined by the same Judge on the *voir dire* and pronounced competent should afterwards manifestly appear to him to be in such a mental condition as to be incompetent to give evidence, the evidence must be withdrawn from the jury.** Formerly all persons having an interest in the suit were on that ground disqualified, as were also the husbands

and wives; but their disqualifications have been entirely abolished, although with regard to certain matters, the witness may refuse to give evidence, and in one case the uncorroborated evidence of the plaintiff will not suffice to obtain a verdict. A person whose name is in the commission of assize may be examined as a witness; so may a juror. In an action to enforce his award the arbitrator may be called as a witness to prove what passed before him, what matters were presented for his consideration and what claims admitted, but he cannot be asked as to what passed in his own mind when exercising his discretionary power on the matters submitted to him, nor can he be asked questions to explain, aid or contradict his award: *Buccleugh, Dk. of, v. Metropolitan Board of Works*, L. R. 5 H. L. 418. See also *In re Christie and Toronto Junction*, 22 A. R. 21. Counsel and solicitors in the cause may also be witnesses in it; but the practice is open to objection, and such evidence should if possible be dispensed with. When a counsel in a cause is by consent allowed to go upon the stand to prove a particular fact, he becomes a witness in the cause generally, and may be cross-examined upon any fact in the cause: *Gilbert v. Campbell*, 2 Han. 55 (N.B.). Though the practice of counsel in a cause giving evidence is most objectionable, yet a Judge at *nisi prius* has no authority to refuse it, if offered: *Bank of B. N. A. v. McElroy*, 2 Pug. 462 (N.B.).

SWEARING OF WITNESSES.

Oath of Witnesses.

By the common law of England every witness must be sworn according to some religious ceremony or other, and if it be dispensed with it can only be by the authority of an Act of Parliament. There is, however, no prescribed form of oath; it is to be that which the witness himself declares to be binding upon his conscience, and he is always allowed to adopt the ceremonies of his own religion: *Onick and v. Barker*, Willes, 547.

A witness may be asked whether he considers the form of administering the oath to be such as will be binding on his conscience. The proper time for asking him this question is before the oath is administered, but as it may happen that the oath may be administered in the usual form by the officer before the attention of the Court or party or counsel is directed to it, the objection is not in such a case to be precluded; but the witness may nevertheless be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative he cannot then be further asked whether there be any other mode of swearing more binding upon his conscience: *The Queen's Case*, 2 B. & B. 284.

Formerly it was considered necessary in all cases that an oath, that is a direct appeal to a divine power, should be made by the witness. Numerous sects have, however, arisen, the members of which allege conscientious objections to take an oath. In order to prevent the difficulty which arose from large classes of the community being thus rendered unavailable as witnesses, various statutes have from time to time been passed exempting such persons from the necessity of taking an oath, and allowing them to substitute a solemn affirmation in its stead.

On a trial for murder an Indian witness was offered, and on his examination by the Judge, it appeared that he was not a Christian and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state and in a Supreme Being, who created all things, and in a future state of rewards or punishment according to their conduct in this life. He was then sworn in the ordinary way: Held, that his evidence was admissible; *Regina v. Pah-Mah-Gay*, 20 U. C. R. 195. Where a person stated that he believed in a Supreme Power—a God as defined by Christ's teaching, in heaven and hell, and in a future state of rewards and punishments, but that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath, and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent to be sworn as a witness; *Farrell v. Manchester*, 3 E. L. R. 244; *Farrell v. Portland Rolling Mills Co.*, 3 N. B. Eq. 508.

A witness in a County Court action declined to be sworn on the Court copy of the Testament or to take the oath in the Scotch form, but wished to be sworn on a copy of the Testament which he produced. The County Court Judge refused to allow this. On appeal the Court intimated, that while it might have been wiser for the County Court Judge to have looked at the book produced to see that it was a Testament, and then, if it was, allowing the witness to be sworn on it, he could have compelled the witness to be sworn by exercising his powers as to contempt of Court: *Rabey v. Birch*, 72 J. P. 106.

Persons who, from defective education, did not understand the religious obligation of an oath, and also persons who did not acknowledge an absolute divine power, or acknowledging such a power did not believe it would punish perjury, were equally incapable of giving evidence. All objections on these grounds have been removed by statute.

Sections 14 and 15 of the Ontario Evidence Act are as follows:—*

14. Where an oath may lawfully be administered to any person as a witness or as a deponent in an action or on appointment to any office or employment or on any occasion whatever, such person shall be bound by the oath administered, if the same shall have been administered in such form and with such ceremonies as each person may declare to be binding.

15. (1) If a person called as a witness or required or desiring to give evidence or to make an affidavit or deposition in an action or on an occasion whereon or touching a matter respecting which an oath is required or permitted, objects to take an oath or is objected to as incompetent to take an oath, and if the presiding Judge or the person qualified to take affidavits or depositions is satisfied that such person objects to be sworn from conscientious scruples or on the ground of his religious belief or on the ground that the taking of an oath would have no binding effect on his conscience, such person may make an affirmation and declaration in lieu of taking an oath and such affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

(2) Where the evidence is in the form of an affidavit or written deposition the person before whom the same is taken shall certify that the deponent satisfied him that he was a person entitled to affirm.

A witness who, to the question "Do you know the nature of an oath?" answers "No," is not therefore incompetent more particularly, when by other answers he shews himself to be not "insensible" to the religious obligation of an oath. The rejection of his evidence by the Judge, in a trial by jury, is improper and a sufficient ground for a new trial: *Cabana v. McManamy*, Q. R. 35 S. C. 3.

CREDIBILITY OF WITNESSES.

The credibility of witnesses is altogether a question for the jury, but a different rule prevails where there are writings which tend to confirm the testimony of one side or the other: *Smith v. Andrews*, 1 P. & B. 541 (N.B.). Where the evidence is contradictory, the Court will not interfere with the findings of the Judge who tried the case: *Cook v. Patterson*, 10 A. R. 645. Where there is direct conflict of testimony the finding of the Judge at the trial must be

* Compare

R. S. B. C., c. 71, s. 23.

R. S. Mad., c. 57, s. 37.

R. S. N. B., c. 127, s. 14.

R. S. N. S., c. 163, s. 23.

regarded as decisive, and should not be overturned in appeal by a Court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination: *Grassett v. Carter*, 10 S. C. R. 105. Where two witnesses of apparently equal credibility contradict each other as to particular statements or conversations, acceptance should be given rather to one who remembers what happened than to one who denies, probably because he does not remember. Another rule for dealing with such conflicts of evidence is, to consider what facts are beyond dispute and to examine which of the two accounts in conflict best accords with those facts according to the ordinary course of human affairs and the usual habits of life or business: *H. W. Kastor & Sons Advertising Co. v. Coleman*, 11 O. L. R. 262, 6 W. R. 791. When several witnesses equally intelligent and credible who appear to give their testimony in good faith, do not agree upon the existence of a fact, the Court should adopt the version of the majority rather than that of the minority.

2. As between witnesses equally honest the Court ought rather to believe those who would not be likely to be mistaken than those who are likely to misconceive the facts in question: *Guay v. Village of Malbaie*, Q. R. 25 S. C. 263. In the estimation of the value of the evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative. The evidence of witnesses who are near relatives, or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses. Evidence of common rumour is unsatisfactory and should not generally be admitted: *Leffeunteum v. Beaudoin*, 28 S. C. R. 89. There is nothing in our law to oblige a trial Judge (any more than a jury) to accept the evidence of two witnesses rather than one. The principle referred to by Taschereau, J., in *Leffeunteum v. Beaudoin*, 28 S. C. R. at p. 93, has no application. Neither the reason for the supposed rule, nor the rule itself, accepted: *Staunton v. Kerr*, 1 O. W. N. 496. There is no rule in our law that a Judge or jury or other trial tribunal must accredit any witness even though not contradicted: *Roe v. VanNorman*, 19 O. L. R. 449. When two equally credible witnesses called by one side contradict each other it is not competent for the party calling them to seek to discredit one and accredit the other: *Sumner v. Brown*, 25 T. L. R. 745. Held, that witnesses being of equal credibility a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, because he who testifies to a negative may have forgotten a thing that did happen, but it is impossible for the one swearing affirmatively to remember a thing that never existed: *Watt v. Watt*, 1 Sask. L. R. 418; 8 W. L. R. 953.

CORROBORATIVE EVIDENCE.

See *Radford v. Mardonald*, 18 A. R. 107.

Sections 11, 12 and 13 of the Ontario Evidence Act are as follows:

11. The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise.

12. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

13. In any action by or against a lunatic so found or an inmate of a lunatic asylum, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment, or decision on his own evidence, unless such evidence is corroborated by some other material evidence.

The material corroborative evidence required by R. S. O. 1897, c. etc., evidence, 73, s. 10, in a proceeding by or against the executor of the will, or the administrator of the estate, of a deceased person, may be given by one who is interested as *cestui que trust* in the matter of the claim in question in the action. The interest of such a witness in the result may well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration: *Batzold v. Upper*, 4 O. L. R. 116. The evidence of executors that promissory notes belonging to the testator had, when they came into their hands, endorsements upon them shewing that payments had been made to him, does not require corroboration under s. 10 of R. S. O. c. 61: *Staebler v. Zimmerman*, 21 A. R. 266. To enable an opposite or interested party to recover in an action against the estate of a deceased person it is sufficient if his evidence is corroborated, i.e., strengthened by evidence which apparently helps the judicial mind to believe one or more of the material statements or facts deposed to: *Parker v. Parker*, 32 U. C. C. P. 113, approved. Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances and for goods supplied, the books of the tenant in which the transactions were set out and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances: *In re Jelly Union Trust Co. v. Gamon*.

6 O. L. R. 481. The corroboration required by s. 50 of the Evidence Act (B. C. Stat. 1900, c. 9, s. 4), must refer specifically to the contract on which action is based, and not to some part of it so as to leave the effect of the whole unascertained: *Blacquiére v. Corr*, 10 B. C. R. 448. In an action by an executor of a deceased mortgagee against two joint mortgagors, both the latter deposed to certain payments made by one or the other in the lifetime of the mortgagee:—Held—Each mortgagor was an opposite or interested party in the same degree and of the same kind, and constituted together an opposite or interested party within the meaning of the section, and the fact of both the mortgagors testifying to such payments, did not constitute corroboration within the meaning of R. S. O. c. 61, s. 10: *Taylor v. Regis*, 26 O. R. 483. Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it. Such statements held sufficient corroboration of the plaintiff who had drawn the will in question, which had been lost or stolen and who was claiming large benefits under it: *Stewart v. Walker*, 6 O. L. R. 495.

EXAMINATION OF WITNESSES.

Examination in Chief.

On almost every trial a great deal of discussion arises as to putting leading questions. Leading questions are those which from the form in which they are put are likely to communicate to the witness a knowledge of what answer would be favourable to the person putting it; which would of course be dangerous with a dishonest witness. In some cases of critical inquiries also, it is very desirable to get the witness's own impression, which the most veracious witness might not after another view had been once suggested to him be able to recall. The objections, therefore, to leading questions apply by no means with equal force to all witnesses, and to all parts of an inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover innumerable questions are put for a mere formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry. As a great saving of time is effected by leading a witness, it would be extremely undesirable to stop it where it is otherwise unobjectionable. There is no distinction recognized by the law between questions which are, and questions which are not leading. To object to a question as leading is only a mode of saying that the examination is being conducted unfairly. It is entirely a question for the presiding Judge to say, in his discretion, whether or not the examination is being conducted fairly. It is

sometimes said that all questions capable of being answered by merely Yes or No are objectionable as leading. But this is a very fallacious test, even in the most critical parts of an inquiry. On the other hand it is sometimes said that the objection that the question is leading may be got over by putting it in the alternative; but it is obvious that nothing would be easier than to suggest in this way a whole conversation to a dishonest witness. A witness produced to read or explain a series of ancient records brought into Court may be asked to state the result of them; and this is permitted for saving of time, and because the witness can be interrogated as to the particular entries on which he founds his general statement of their purport and effect, and may be called upon to point them out to the Court: *Rowe v. Brenton*, 3 M. & Ry. 212. It has been already shewn that oral proof of a written document cannot be admitted on examination-in-chief unless a proper foundation for it be laid by accounting for the non-production of the writing itself; and that **where any agreement, communication or statement is the subject of inquiry, the opposite party may interpose the question—Whether it was in writing?** Where a witness for the plaintiff cross-examined as to the contents of a lost letter, swore that it did not contain a certain passage, and a witness was called by the defendant to contradict this statement, Lord Ellenborough ruled that he might be asked if it contained a particular passage recited to him which had been sworn to on the other side; for otherwise it would be impossible ever to come to a direct contradiction: *Courteen v. Touse*, 1 Camp. 43. And where in cross-examination a witness being asked as to some expressions which he had used, denied them, and the counsel on the other side called a person to prove that the witness had used such expressions, and read to them the particular words from his brief, Abbott, C.J., held that he was entitled to do so: *Edmonds v. Walter*, 3 Stark. 7; and this is now the common practice. But where a witness denied on cross-examination the use of certain expressions by him in a conversation at which both plaintiff and defendant were present, it was held that a witness called to prove that such expressions were used could not have the very words suggested to him; the conversation being evidence in itself, and not proved for the mere purpose of discrediting the witness: *Hallett v. Cousins*, 2 M. & Rob. 228.

If a witness when called displays a determination to speak as unfavourably as possible to the party calling him, or as it is sometimes called, proves hostile, then the party calling him may conduct the examination with the same latitude as we shall hereafter see a cross-examination may be conducted: see *Coles v. Coles*, L. R. 1 P. & M. 70; but he must confine himself to matters material to the issue. The party calling

a witness cannot cross-examine him merely to test his credit as his opponent may. It has been ruled that if a witness stands in a situation which of necessity makes him adverse to the party calling him, the counsel may as matter of right cross-examine him: *Clarke v. Saffery*, Ry. & M. 126. The presiding Judge has a discretion as to the mode of examination in order best to answer the purposes of justice. *Per Abbott, C.J., Bastin v. Carey, Id.* 127.

When a question is propounded, the opposite party may object that it is one which transgresses the rules of evidence. If not objected to, or if the objection be overruled, the witness must answer it unless he can show that he has some privilege which enables him to refuse to do so. If he refuse to answer the question and can show no privilege, he will be liable to be fined and imprisoned by the Court: *Ex parte Fernandez*, 10 C. B. N. S. 11; 30 L. J. C. P. 321.

Where a witness (whether party to the action or not) is called to prove a case, and his evidence disproves it, the party calling him may yet establish his case by other witnesses called not to discredit the former, but to contradict him on facts material to the issue; and the right to contradict by such other evidence exists without leave of the Judge at the trial: *Stanley Piano Company of Toronto v. Thomson*, 32 O. R. 341. If, in a case tried without a jury, evidence has been improperly admitted, a Court of Appeal may reject it and maintain the verdict if the remaining evidence warrants it: *Merritt v. Hepenstal*, 25 S. C. R. 150. Where a party to a suit examines a witness at the hearing, the party calling him cannot afterwards exclude his testimony from the consideration of the Court: *Vannatto v. Mitchell*, 13 Chy. 665. Defendant having made one objection to the evidence, which was overruled, allowed it to be read and commented upon it: Held, that he was precluded from taking any further exceptions: *Farrel v. Stephens*, 17 U. C. R. 250. Where at a trial an objection was taken to the form of the return, the Court would not on argument allow another objection which would have been fatal if urged at the trial: *Hibbert v. Johnston*, 6 O. S. 635. At the commencement of the trial the counsel for the defendant not being present, the counsel for the plaintiff opened his case, and while he was reading evidence taken under a commission at Montreal the counsel for defendant appeared and objected to the commission, as the envelope enclosing it was not under the hand and seal of the commissioner and there was no affidavit of the due taking: Held, that the objection was fatal and taken in time: *Reford v. McDonald*, 14 U. C. C. P. 150. At the close of the defence the plaintiff's counsel without objection put in the defendant's examination before trial. The plaintiff's counsel in addressing the jury read a portion thereof, and the Judge in his

charge read other portions: Held, there could be no objection to the Judge reading such other portions, as they were properly in evidence: *Seougall v. Stapleton*, 12 O. R. 296. The erroneous exercise of discretion in refusing to allow questions on cross-examination which are irrelevant to the issue is no ground for a new trial: *Hutley v. Fitzgerald*, 41 U. C. R. 303.

Cross-examination.

Upon cross-examination counsel may lead the witness so as to bring him directly to the point in his answer, but he cannot, if the witness shows an obvious leaning in his favour, go the length of putting into the witness's mouth the very words which he is to echo back again: *Hardy's Case*, 24 How. St. Tr. 755. Indeed in such a case the usual latitude of cross-examination would perhaps not be allowed. It is not allowable for counsel on cross-examination to mislead the witness by assuming facts to be evidence which have not been proved, or try to entrap him by mis-statement. This is sometimes attempted in practice by handing wrong papers to the witness in order to test his judgment in the proof of handwriting. It is not competent to counsel to question a witness concerning a fact irrelevant to the matter in issue for the mere purpose of discrediting him by calling other witnesses to disprove what he says: *Spencely v. De Willott*, 7 East. 109; but should the witness answer such a question evidence cannot be given to contradict: *Harris v. Tippet*, 2 Camp. 637; or to confirm his evidence: *Tolman v. Johnson*, 2 F. & F. 66. As to order of conducting cross-examination this is a matter in the discretion of the Judge. Leading questions may be put in cross-examination whether the witness be favourable or not. But as remarked in *Stewart v. Walker*, 6 O. L. R. at 506, it would lessen the value of the testimony: *Parkin v. Hoon*, 7 C. & P. 409. The defendants appeared and pleaded jointly by the same attorney, their defence being in substance precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness both counsel claimed the right to cross-examine: Held, affirming the ruling of the Judge at the trial, that this was a matter of procedure and within the discretion of the trial Judge, and that moreover he was right in refusing to allow more than one counsel to cross-examine the witness: *Walker v. McMillan*, 6 S. C. R. 241.

When a party is compelled to call the attesting witnesses to a will or codicil he may cross-examine them, as they are not the witnesses of either party, but of the Court: *Jones v. Jones*, 24 T. L. R. 829.

As to contradictory oral statements made by witness, Section 18 of the Ontario Evidence Act is as follows:—

Proof of
contradictory oral
statements.

18. If a witness upon cross-examination as to a former statement made by him relative to the matter in question, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof is given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

Re-examination.

A re-examination which is allowed only for the purpose of explaining any facts which may come out on cross-examination must be confined to the subject-matter of the cross-examination. Counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful. And also of the motive by which the witness was induced to use these expressions; but has no right to introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness: *The Queen's Case*, 2 B. & P. 297. The conversations of a party to the suit relative to the subject matter of the suit are in themselves evidence against him in the suit. And if the counsel chooses to ask a witness as to anything which may have been said by the adverse party, the counsel for that party has a right to lay before the Court the whole that was said by his client in the same conversation. But a witness cross-examined as to assertions of a party in a particular conversation cannot be re-examined as to other unconnected assertions of the party in the same conversation although connected with the subject of the suit. It must not be assumed that cross-examination on part of a conversation necessarily leads in proof of the whole of it: *S. C. Prince v. Samo*, 7 Ad. & E. 627. Where a witness of the plaintiff stated on cross-examination facts which were not strictly evidence, but might prejudice the plaintiff, it was held that unless the defendant applied to strike them out of the Judge's notes the plaintiff was entitled to re-examine upon them: *Bluett v. Tregoning*, 3 Ad. & E. 554.

Previous Statements.

It is not competent to ask a witness, even on cross-examination, respecting a statement formerly made by

him in writing, without showing to him the writing referred to, and putting it in evidence as part of the case of the cross-examining party either immediately or in the ordinary course of the case; and this is the practice whether the question be put merely to discredit the witness by contradicting him, or as conducive to proof of the matter in issue: *Maddonhall v. Evans*, 11 C. B. 930. An examined or office copy of an affidavit or deposition is sufficient foundation to allow all the cross-examination of the witness: *Highfield v. Peake*, N. & M. 109; *Davies v. Dore*, 3 C. J. P. 252.

Section 17 of the Ontario Evidence Act is as follows:—*

17. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the matter in question without the writing being shewn to him, but if it is intended to contradict him by the writing his attention shall before such contradictory proof is given be called to those parts of the writing which are to be used for the purpose of so contradicting him: and the Judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his inspection and may thereupon make such use of it for the purposes of the trial or proceeding as he may think fit.

The effect of this section is as follows:—The witness in the first instance may be asked whether he has made such and such a statement without its being shewn to him: *Sadden v. Sergeant*, 1 F. & F. 322. If he denies that he has made it the opposite party cannot put in the statement without first calling his attention to it (showing it or at least reading it to him) and to any parts of it relied upon as a contradiction. If the witness, instead of denying that he has made the statement, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the Court and jury. If he is aware of the contents he will, it would seem, in such case be at liberty to re-examine the witness as to the residue of the statement without its being produced, on the general rule that if part of any connected conversation or statement be given the whole may be used; or he may ask the Judge under the latter part of the section to require the production of the writing, for the last provision of the above section was probably introduced for the purpose of guarding against an unfair use of the

* Compare

R. S. P. C., ch. 71, ss. 30 and 31. R. S. Man., c. 40, s. 562.

R. S. N. B., c. 127, ss. 17 and 18.

R. S. N. S., c. 163, ss. 44 and 43.

power of cross-examining upon a document which either has no existence in fact, or may have been one partly brought before the jury and imperfectly understood.

If a conversation be given in evidence to prove an admission, the whole of it must generally be laid before the jury, and this if omitted may be got out by cross-examination, subject to certain limitations explained on page 156.

When a document is put into the hands of a witness under cross-examination merely to prove the signature or identity or general nature of it, the opposite party is not entitled to immediate inspection of it, except sufficiently to enable him to re-examine about the writing, and also to identify the document in case it should afterwards be put in evidence. He may not read the document through or comment upon its contents until it is put in on the other side, nor does it till then become evidence in the cause; but if any question be put as to its contents, or any further question be founded on it, there will be a right to inspect it: see 2 Taylor, Evidence S., 1307. And in general, mere proof of handwriting by a witness, whether on examination-in-chief or cross-examination, does not oblige the party to put it in evidence or entitle his opponent to use it as evidence, although its absence may of course be legitimate ground of comment by him. But the handwriting may, of course, be disputed if afterwards put in. A witness may be cross-examined as to his having omitted to mention a fact on a former examination, though that examination was in writing and not produced: *Ridley v. Lyde*, 1 M. & Rob. 197. A question cannot be put to a witness on cross-examination for the mere purpose of contradicting unless such question be relevant to the issue; and if such question be put the answer is conclusive: *Gilbert v. Gooderham*, 6 P. R. 39. Papers proved on cross-examination are to be treated as the evidence of the party producing them: *Crane v. Clarke*, Hil. T., 1828 (N.B.). Where the plaintiff has been examined as a witness on a former trial respecting the same subject, it is necessary in order to prove his testimony that the witness should swear to the words used by him and not merely to the effect of them: *Fraser v. Black*, 2 All. 312. Where a witness had given his version of a conversation in which it was alleged that for a certain consideration he had agreed to waive the cesser clause, the question "Then so far as you were concerned you did not agree to waive that?" was properly rejected, inasmuch as it was for the jury to say upon the evidence already given whether or not the defendant had waived the cesser clause: *Loritt et al. v. Snowball*, vol. 32, 217 (N.B.). If the plaintiff calls and examines the defendant as a witness, he is not when afterwards examined as a witness in his own case to be treated as a recalled witness, but his

counsel has a right to examine him, and to prove his defence as fully as if the defendant had not been previously called as a witness by the plaintiff: *Betts v. Tenning*, 1 Pug. 267 (N.B.).

RECALLING WITNESSES.

It is in the discretion of the Judge whether he will permit a witness to be recalled: *Cutlin v. Baile*, 5 C. P. 291. Where a party supporting a deed proves the handwriting of a deceased witness in order to raise the presumption of due execution, the other party may shew the character of such witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him: *Chamberlain v. Torrance*, 14 Chy. 181. In assumpsit for breach of promise of marriage the defendant is entitled to cross-examine the plaintiff's own witness respecting the general bad character of the plaintiff: *McGregor v. McArthur*, 5 U. C. C. P. 493. In an action on a Crown bond in which the defendant pleaded *non est factum* proof of an admission by him that it was his bond, is not an estoppel; and evidence having been given by the Crown of the handwriting of the subscribing witness, the defendant was allowed to give evidence that the signature of the witness was a forgery: *Reg. v. Robertson*, 6 All. 113 (N.B.). The defendant's counsel desired at the close of plaintiff's case to recall a witness to examine him as to what he meant when he spoke of the delivery of the deed, having already had the opportunity of cross-examining him on the point. The Judge who tried the case declined to allow the witness to be recalled for that purpose: Held, that it was a matter within the discretion of the Judge, and that he had exercised the discretion wisely: *Graham v. Graham*, 2 R. & C. 265 (N.S.). A witness for the plaintiff denied on cross-examination having made a statement in presence of L., who was afterwards called by the defendant and contradicted him: Held, that the plaintiff might call evidence in reply to rebut L.'s testimony and confirm that of his own witness, such evidence not being properly part of the plaintiff's case in the first instance: *Whelpley v. Riley*, 2 All. 275 (N.B.). The Court will not review the discretion of the Judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse, nor in receiving evidence on the part of the defence after the close of the plaintiff's case, even though for the purpose of corroborating the defence: *Herbert v. Mercantile Fire Insurance Company*, 43 U. C. R. 384. Where a witness on cross-examination denied having signed a paper, but which was not then shewn to him, and the opposite party afterwards produced the paper and gave evidence to prove the witnesses's signature to it, the witness may be recalled to disprove the signature: *Tomkins v. Tibbits*, 1 Han. 517 (N.B.).

DISCREDITING WITNESSES.

Although a witness's answer upon a collateral fact is usually conclusive, yet where the object of the inquiry is to prove that the witness has endeavoured to corrupt another to give false testimony in the cause, his denial of the fact or refusal to answer will not prevent the party from proving it by other evidence: *The Queen's Case*, 2 B. & B. 311. But this can only be done by the opposite party; **the person calling a witness having once put him forward as a person worthy of belief, though he may contradict him, cannot afterwards discredit him if the testimony of the witness should turn out unfavourable, or even should the witness assume a position of hostility towards the party calling him: *Pace v. Ambrose*, 3 B. & C. 749.**

The Ontario Evidence Act, s. 19, provides: *

Proof of
previous
conviction
of a wit-
ness may
be given if
he denies
it, etc.

Certificate
of convic-
tion.

19. (1) A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved; and a certificate containing the substance and effect only (omitting the formal part) of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the officer, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

(2) For such certificate a fee of \$1 and no more may be demanded or taken.

INFERENCE FROM NOT CALLING THE PARTY.

Since parties have been made competent witnesses it has been a common practice to comment on their absence as witnesses, and to make observations on it as a suspicious suppression of unfavourable testimony. There seems to be no legitimate objection to such comments: and where a party is present in Court, and testimony has been given which he must be able if untrue to contradict, and is interested in doing so, great weight will naturally be given to such comments. But the mere fact of his not being offered as a witness is not *per se* evidence against him, though it may turn the scale if his absence is unexplained, and

* Compare

R. S. B. C., c. 71, s. 32.
R. S. Man., none.

R. S. N. B., c. 127, s. 18.
R. S. N. S., c. 163, s. 45.

there is other slight evidence or some ambiguous admission by him out of Court. See *M'Acen v. Catching*, 27 L. T. Ex. 41. The case bears some resemblance to that of admissions implied from a tacit acquiescence in statements made in the party's presence.

CONTRADICTING OPPONENT'S WITNESSES.

In order to impeach the credit of a witness evidence may be given of statements made by him at variance with his testimony on the trial; not to lay a foundation for the evidence of such contradictory declaration or conversation the witness must be asked on cross-examination whether he has made such declaration or held such conversation: *The Queen's Case*, 2 B. & B. 301. Before he can be contradicted he must be asked as to the time, place and person involved in the supposed contradiction. It is not enough to ask him the general question whether he has ever said so and so: *Angus v. Smith*, M. & M. 474. Where the witness merely says that he does not recollect making the statement, such statement may be proved by a cross-examining party.

Where the object in proving the statements of a witness is not merely to contradict him, but to impeach his moral character by proof of loose and unbecoming language, the evidence seems admissible without previous enquiry of himself: *Carpenter v. Wall*, 11 Ad. & E. 803. Where a document is offered in evidence to contradict the statement of a witness as to a material fact denied by him, it is admissible though it also tends to prove the issue in the cause for which purpose alone it would have been inadmissible: *Watson v. Little*, 5 H. & N. 472. "If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out that he has a near connection with the party on whose behalf he appears; or that a change of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony that a similar account was given when the contract alleged had every prospect of advantage, removed the imputation resulting from the opposite circumstances:" Pothier's *Oblig.* 2, 251 (Evans).

An opponent's witness may be contradicted on all points material to the issue; but he cannot be contradicted upon any point not material to the issue with a view of shewing that his evidence generally is not worthy of credit. If the witness's answer to a question would if truly made tend to qualify or contradict or discredit some other relevant part of his testimony, then other evidence may be received to contradict him; and a fact

may be considered as "relevant," though not part of the transaction in issue, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case: *semble*, *Melhuish v. Collier*, 15 Q. B. 878, 19 L. J. Q. B. 493; but a merely irrelevant inquiry cannot be allowed. It is true that by shewing the levity or falsehood of a witness even on irrelevant matters his testimony would in some degree be discredited, yet the expediency of confining the field of inquiry at *nisi prius* within a reasonable compass has made it necessary to assign a limit to such collateral issues. Without such restraint the examination of each witness might give rise to different issues remote from the immediate issue on the record, which the parties have not come prepared to try, and by which both witnesses and parties might be unfairly prejudiced.

CONTRADICTING PARTY'S OWN WITNESS.

If a witness gives evidence contrary to that which the party calling him expects, that party cannot give general evidence to shew that the witness is not to be believed on his oath: *Ewer v. Ambrose*, 3 B. & C. 749. And although it was always considered that a party might contradict the evidence of his own witness upon facts material to the issue, yet it was long a question whether it was competent to him to prove that the witness had previously given a different account of the transaction: *S. C. Id.*; *Melhuish v. Collier*, 15 Q. B. 878, 19 L. J. Q. B. 493. In the last case it was held that the witness may at all events be examined as to his former statements, and contradicted as to any facts that are relevant, although the direct effect may be to discredit him; and it has been the constant practice to call evidence to contradict the statement of other witnesses already called by the same party; as where attesting witnesses deny their own signature. See also *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193. And now it is provided by the Ontario Evidence Act, s. 20.*

How far a party may discredit his own witness.

20. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the Judge or other person presiding proves adverse, such party may, by leave of the Judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony; but before such last mentioned proof is given, the circum-

* Compare

R. S. B. C., c. 71, s. 33.
R. S. Man., none.

R. S. N. B., c. 127, s. 15.
R. S. N. S., c. 163, s. 42.

stances of the proposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

It will be seen that leave of the Judge is made a condition precedent to the proof of former inconsistent statements, and also premonition and pre-examination as to such statements. In one particular the Act seems to limit the former admitted liberty of calling witnesses to contradict another witness called by the same party, for in such cases it has been the practice for counsel to consult only their own judgment in calling other witnesses to prove all relevant facts, although their testimony may incidentally contradict the testimony of one already called on the same side. This difficulty has been noticed by the Court in *Greenough v. Eccles*, 5 C. B. N. S. 786, 28 L. J. C. P. 160; but it seems to have been the opinion of the Court in that case that the Act is not to be construed as limiting the former liberty to call other witnesses to contradict the testimony of the adverse witness. It was there decided also that "adverse" means hostile and not merely unfavourable, and that the inconsistent statements of the witness are only admissible where the Judge considers his animus to be hostile. A series of letters may be used for the purpose of contradicting the witness although one only be directly inconsistent: *Jackson v. Thomason*, 1 B. & S. 745, 31 L. J. Q. B. 11. Where a witness gave evidence quite different from the proof in the brief, which had been prepared in the usual way from the previous statements of the witness to the attorney, Bramwell, B., allowed him to be examined under this section as to his previous oral statements to the attorney, and also allowed the attorney to be called to contradict him: *Amstell v. Alexander*, 16 L. T. N. S. 830. But in a similar case it was held that the section was not meant to apply to the loose statements made by the witness to the attorney with a view to prepare the evidence, and the Court granted a rule *nisi* for a new trial on the ground that witnesses had been called at the trial to prove such statements: *Reed v. King*, 30 L. T. 290, H. T. 1858, Ex. Where a witness had given contrary evidence on his examination in bankruptcy, it seems that evidence was allowed to be used to contradict him: *Pound v. Wilson*, 4 F. & F. 301. See also *Dear v. Knight*, 1 F. & F. 433. It has been held that where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be necessarily repudiated: *Bradley v. Ricardo*, 8 Bing. 57. But in *Faulkner v. Brine*, 1 F. & F. 255, Lord Campbell, C.J., intimated that the effect of such contradiction was to throw over the evidence of the witness altogether.

The following sections of the Canada Evidence Act, R. S. C. 1906, chap. 145, will be found useful:

Incriminating questions.

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not receivable against witness.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any Provincial Legislature, the witness would, therefore, have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such Provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him, thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

Examination of mute.

6. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible.

Expert witnesses.

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding.

Not more than five without leave.

When leave to be obtained.

2. Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.

Examination as to previous conviction.

12. A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing.

How conviction proved.

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence or a copy of the summary conviction, if for an offence punishable upon summary conviction purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned, and—

(b) proof of identity.

Section 7 of the Ontario Evidence Act is as follows:—*

7. (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature of Ontario.

Witness not excused from answering questions tending to criminate.

(2) If with respect to any question a witness objects to answer upon any of the grounds mentioned in subsection 1, and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature of Ontario.

Answer not to be used in evidence against him.

"To entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself the effect of any particular question." *Ex parte Reynolds*, 20 Ch. D. 294 C. A. Thus the Judge is to use his discretion whether he will grant the privilege upon the bare claim of the witness, or whether he will investigate the claim by further inquiry. Of course the witness must always pledge his oath that he believes the answer to the question will tend to criminate him, and if he assigns a reason which, in the opinion of the Court, will not criminate him, he is not privileged: see *Scott v. Miller*, John. 220, 28 L. J. Ch. 584; *Ex parte Adams*, 4 D. G. & J. 329, 28 L. J. Ch. 632.

Counsel interested in excluding the evidence will not be allowed to argue in support of the objection: *P. v. Adop.* 1 M. & Rob. 94. A witness is not compellable to answer questions put for the mere purpose of degrading his character: *Cook's Case*, 13 How. St. Tr. 334; *Friend's Case*, Id. 17; *Laver's Case*, 16 How. St. Tr. 161; though such questions may be legally asked: *R. v. Edwards*, 4 T. R. 440; *R. v. Holding*, Arch. Cr. Law, 102; *Cundell v. Pratt*, M. & M. 108. See the cases collected: 1 Phill. Ev. 269. **If the witness**

* Compare

R. S. Man., c. 57, s. 5.

R. S. B. C., c. 71, s. 11.

R. S. N. B., c. 127, s. 8.

R. S. N. S., c. 103, s. 27.

choose to answer, his answer is generally conclusive: *R. v. Watson*, 2 Stark, 149.

A solicitor when questioned as a witness with regard to matters involving his client's interests, should decline to answer unless directed or at least permitted by the Court; and where a different course was taken:—Held, on motion for a new trial, that it might be deemed a surprise upon the client, and a new trial was granted with costs to abide the event: *Livingston v. Gartshore*, 23 U. C. R. 166. Communications between solicitor and client are privileged, no matter at what time made, so long as they are professional and made in a professional character: *Macdonald v. Putnam*, 11 Chy. 258, not followed: *Hamelyn v. White*, 6 P. R. 143. Where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties, he ceases in respect of the execution of the instrument to be clothed with the character of a solicitor or counsel, and is bound to disclose all that passed at the time relating to such execution: *Magee v. The Queen*, 3 Ex. C. R. 304. When a plaintiff refused to answer questions to state whether or not he apprehended serious consequences if he answered, and the Judge directed that there had not been sufficient proof made: Held, that the defendant was entitled to the oath of the plaintiff that he objected to answer for fear that in doing so his answers might tend to criminate him. Judgment appealed from (20 N. B. Rep. 40) reversed: *Power v. Ellis*, 6 S. C. R. 1.

The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor: *Stewart v. Walker*, 6 O. L. R. 495.

EVIDENCE OF CHARACTER.

In general, in actions unconnected with character, evidence as to the character of either of the parties to a suit is inadmissible, being foreign to the point in issue and only calculated to create prejudice. For the same reason where particular acts of misconduct are imputed to a party, evidence of general character is excluded; but it is otherwise where general character is put in issue: 1 Taylor. Evid. S., 328-329. As, however, the veracity of a witness is always a point in issue, his character for veracity may be impugned by the party interested in discrediting him by shewing that he is unworthy of credit. If a witness's character for veracity be impeached witnesses may be called in support of it. Although evidence is admissible to shew that a witness bears such a character and reputation that he is unworthy of credit, yet it is not allowed (with the exception of facts

which go to prove that the witness is not an impartial one; to prove particular facts in order to discredit him: *R. v. Laver*, 14 How. St. Tr. 285.

Evidence of particular facts is admissible where the facts sought to be proved go to shew that the witness does not stand indifferent between the contending parties. Thus it may be proved that the witness has been bribed: *R. v. Langhorn*, 7 How. St. Tr. 446; or that he has endeavoured to suborn others: *R. v. Stafford, Ltd.*, Id. 400. See *Att-Gen. Hitchcock*, 1 Exch. 93. In *R. v. Yewing*, 2 Camp. 638, the witness was asked whether he had not said that he would be avenged upon the prisoner and would soon fix him in gaol. This he denied and he was allowed to be contradicted.

The question as to the witness's character for credibility must be put in general form: *Mawson v. Hartsink*, 4 Esp. 102. **The usual form of the question is as follows: "From your knowledge of the witness do you believe him to be a person whose testimony is worthy of credit?"**

EXCLUSION OF WITNESSES.

The Ontario Consolidated Rules of Practice provide:—

547. The Judge at the trial shall at the request of either party order a witness to be excluded from the Court until he is called to give evidence, and also if the Judge deems it expedient, a party intending to give evidence; or he may require such party to be examined before the other witnesses on his behalf. Any such witness or party who does not conform to such order shall be liable to be punished as to the Judge may seem just, and the Judge may in his discretion exclude the testimony of any witness or party who does not conform to such order.

During the trial the Court will on the application of either party order all the witnesses in the cause except the one under examination to go out of Court. But if the solicitor in the cause is a witness, he will in general be suffered to remain, his assistance being necessary to the proper conduct of the cause: *Pomroy v. Baddeley*, Ry. & M. 430. This, however, is a matter entirely for the discretion of the Judge. If the witness remains after being ordered to withdraw it will not necessarily prevent his being examined: *Parker v. McWilliams*, 6 Bing. 683. It is not the practice to order either of the parties out of Court so long as their conduct there is unobjectionable: *Charcock v. Dewings*, 3 C. A. R. & K 378. But as a party can now be a witness, as such he is liable to be ordered out of Court. As, however, a party may conduct his own case in Court, examine his witnesses, and give evidence as one himself: *Cobbett v. Hudson*, 1 E.

& E. 11: it follows that the party in such a case has the right to remain in Court. Notice had been given on a previous day of the assizes that parties to the record wishing to give evidence must not remain in Court during the examination of other witnesses, and the Judge rejected the evidence of a defendant for disobedience of such notice: Held, that he had authority to do so: *Winter v. Mizer*, 10 U. C. R. 110. But it was held otherwise in *Strachan v. Jones*, 3 U. C. C. P. 253; and in *MacFarlane v. Martin*, 3 U. C. C. P. 64. See also *Mahoney v. Macdonell*, 9 O. R. 137; *Black v. Besse*, 12 O. R. 522. Where in an action for goods sold and delivered, plaintiff made out a *prima facie* case through his clerk, who proved a delivery of the goods; and the promise to pay on request implied therefrom was repelled by defendant, who stated a special contract varying from that implied: Held, that the plaintiff was admissible as a witness to reply to the new case set up by defendant; and *semble*, he could not be excluded as a witness by reason of his presence in Court during the examination of his clerk: *McFarlane v. Martin*, 3 U. C. C. P. 64. At the beginning of a trial all witnesses were ordered out of Court except the parties to the action. Judgment having been given dismissing the action as against the defendant P., his co-defendant M. entered upon his case, and called P. as a witness. P. had remained in Court and heard the whole of the evidence adduced by the plaintiff, and his evidence was rejected on this ground: Held, that the evidence of P. was improperly rejected, and a new trial was ordered: *Mahoney v. Macdonell*, 9 O. R. 137. At the trial of an action the witnesses were ordered out of Court. Before the case was closed the defendant's counsel tendered a witness who had remained in Court, but the presiding Judge refused to allow him to be examined: Held, that there must be a new trial. The practice is to receive such evidence, but with great care: *Black v. Besse*, 12 O. R. 522.

COMPARISON OF HANDWRITING.

The Ontario Evidence Act provides as follows:—*

Comparison of disputed writing with genuine.

52. Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by a witness; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court or jury, as evidence of the genuineness or otherwise of the writing in dispute.

"Knowledge of handwriting may have been acquired either by seeing the party write, in which case it will be stronger or weaker

* Compare—

R. S. N. S., c. 102, s. 133.

R. S. N. B., c. 127, s. 20.

R. S. B. C., c. 71, s. 45.

R. S. Man., none.

according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases) even if he has seen him write but once and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him: *Mudd v. Suckermore*, 5 Ad. & E. 730. If the genuineness of the document sought to be put in is disputed, a collateral question is raised which must first be decided: *Cooper v. Dawson*, 1 F. & F. 550; like all other collateral issues by the Judge: *Bartlett v. Smith*, 11 M. & W. 483. The testimony of experts in handwriting, like all scientific testimony, offers serious dangers as to the credit to be given to it, and should be accepted only after strict testing, and merely for what it is worth, having regard to the other elements of proof in the cause. Proof by comparison of handwriting is insufficient to establish the authenticity of a signature denied on oath by the person against whom it is invoked: *Deschenes v. Langlois*, Q. R. 15 K. B. 388.

The Judge or jury, as the case may be, is without any expert evidence entitled to compare disputed with admitted or proved handwriting and act upon his or their own conclusion: *Thompson v. Thompson*, 4 O. L. R. 442.

MEMORANDUM TO REFRESH WITNESS'S MEMORY.

A witness will be allowed to refer to an entry or memorandum made by himself at the time of or shortly after the occurrence of the fact to which it relates, in order to refresh his memory, although the entry or memorandum would not of itself be evidence: *Kensington v. Inglis*, 8 East, 289; nor does the use of such a memorandum by a witness make it evidence in itself: *Alcock v. R. Exch. Assur. Co.*, 13 Q. B. 292; but he cannot refresh his memory by extracts from a book though made by himself: *Church v. Perkins*, 3 T. R. 749; nor speak from having refreshed it out of Court at least unless he produces the memorandum in Court: *Beech v. Jones*, 5 C. B. 1063; and by a copy of

a book unless the witness himself saw the copy made and checked it at the time by personal examination while the subject was fresh in his recollection; for then the copy is in effect an original entry by himself: *Burton v. Plummer*, 2 Ad. & E. 341. If the witness be blind the paper or memorandum may be read over to him in Court: *Cutt v. Howard*, 3 Stark 4.

Where the witness gives his evidence after having referred to a book or other document, it must be produced: *Howard v. Canfield*, 5 Dowl. 417; and the counsel on the other side has the right to inspect it without being bound to read it in evidence: *Sinclair v. Stevenson*, 1 C. & P. 582; he may cross-examine upon the entries referred to by the witness without making the book evidence *per se* for the party who produces the witness, but if he cross-examine as to other entries in the same book he makes them part of his own evidence: *Gregory v. Tavernor*, 6 C. & P. 281. Where a paper is put into a witness's hand only to prove the handwriting and not to refresh his memory, the opposite party is not entitled to see it: *Sinclair v. Stevenson*, 1 C. & P. 582. The reason for permitting adverse inspection seems to be to check the use of improper documents to secure the benefit of the witness's recollection as to the whole facts, and to compare his oral testimony with the written statement. If it fails to refresh his memory, or is not used for that purpose, the right of inspection fails. A witness may, to refresh his memory, refer to a memorandum made near the time when the event occurred, when the fact was fresh in his mind: *Fraser v. Fraser*, 14 U. C. C. P. 70. A scientific witness cannot be asked questions, the answers to which are based upon previous evidence given by other witnesses and upon which conclusions are drawn which are for the jury to determine: *Key v. Thomson*, 2 Han. 224; *Napier v. Ferguson*, 22 N. B. Rep. (N.B.). Improper reception of testimony will not invalidate a verdict for plaintiff when there is sufficient additional evidence to sustain it: *Russell v. Marshall*, James 330 (N.S.).

EVIDENCE OMITTED BY MISTAKE.*

Evidence omitted by accident or mistake, HOW remedied, 549. Where through accident or mistake or other cause, a party omits or fails to prove some fact material to his case, the Judge may proceed with the trial subject to such fact being afterwards proved at such time and subject to such terms and conditions as to costs and otherwise as the Judge shall direct; and if the case is being tried

* Compare

B. C. Rule, 355.

R. S. Man. c. 49, s. 561. N. S. Rules, Order XXXIV., s. 23.

by a jury the Judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed; and if not so proved judgment shall be entered for the opposite party unless the Judge otherwise directs. This rule shall not apply to an action for libel.

IMPOUNDING DOCUMENTS.

The Ontario Evidence Act provides:—*

53. Where a document is received in evidence, the Court admitting the same may direct that it be impounded and kept in such custody for such period and subject to such conditions as may seem proper, or until the further order of the Court, or of the High Court or a Judge thereof or of a County or District Court (as the case may be). When in statements offered in evidence may be impounded.

FUNCTIONS OF JUDGE.

(See also pages 185-187.)

554. The Judge may, at, or after the trial, direct that judgment be entered or may adjourn the case for further consideration. Judge may direct entry of judgment or reserve judgment.

558. The officer attending the trial shall enter all such findings of fact as the Judge may at the trial direct to be entered, and the directions, if any, of the Judge, as to judgment in a book to be kept for the purpose, and the findings shall also be indorsed on the record. By whom entries or indorsements to be made.

As to the duty of the Judge in directing the jury the Judge is bound to direct a verdict for the defendant unless there is some evidence on which the jury may reasonably act. A mere scintilla of evidence is not sufficient: *Edmonds v. Prudential Assur. Co.*, 2 Ap. Ca. 487. The rule is that if the evidence be such that the jury could conjecture only, not Judge, it ought not to go to the jury, and the onus lies on the party offering the evidence; and if he offers only evidence consistent with either supposition of fact he is not entitled to have it put to the jury: *Phillipson v. Hayter*, L. R. 6 C. P. 42, 43. Where a Judge undertakes to put the evidence before the jury, he is not at liberty to present in a strong light all the facts and circumstances that make for the contentions of one of

* Compare

P. S. R. C., c. 71, s. 46.

R. S. N. S., none.

R. S. Man., c. 57, s. 24.

R. S. N. B., none.

† C. R. 558.

Compare

R. S. Man., c. 40, s. 573.

the parties, and entirely or practically ignore the evidence that makes for his opponent. A charge constructed on such lines is tainted with misdirection, and the verdict resultant thereupon in favour of one of the parties will not stand unless the case is so clear that a verdict for the opposite party, on the evidence before the Court, would be set aside as one that no reasonable jury could give: *Smith v. Archibald*, 41 N. S. R. 211. The power which a Judge has to take a case away from the jury should be exercised only when it is clear that the plaintiff could not hold a verdict in his favour; if the matter is reasonably open to doubt, the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported: *Nightingale v. Union Colliery Co. of British Columbia*, 9 Brit. Col. L. R. 452. It is no ground for a new trial that the Judge refused to submit any particular question to the jury; but if the Judge refuses to charge the jury in respect of the subject-matter of any question which counsel desire to have submitted, it may be made the subject of a motion for a new trial for misdirection: *Turner v. Burns*, 24 O. R. 28. The Judge's charge to the jury can be attacked only for error in law: *City of Montreal v. Ryan*, Q. R. 17 K. B. 143. An objection was taken to the charge as being adverse:—Held, that the charge could not be complained of, for to give effect to the objection would be to compel the Judge to submit the case to the jury, leaving them to apply the evidence without any assistance from him, which was not the practice in this province: *Scougall v. Stapleton*, 12 O. R. 206. It is a rule of practical wisdom that Judge is not allowed to guess: *Re Howell* (1894), 3 Ch. p. 652; *Beal v. Michigan R. R. Co.*, 1 O. W. N. 80. When evidence is tendered the Judge has the right to ask the particular purpose for which it is offered, and if the counsel refuse to state it he may reject it: *Key v. Thomson*, 1 Han. 295 (N.B.). May admit evidence even after the counsel has addressed the jury, and the Court will not interfere if the evidence is not in itself inadmissible or no injustice has been done: *Doe v. Connolly*, 3 All. 337 (N.B.). It is discretionary with the Judge at the trial to allow the counsel to withdraw evidence. (Per Ritchie, C.J.) Where evidence is pressed in against the opinion of the Judge the counsel must stand by it: *Pelton v. Temple*, 1 Han. 274 (N.B.). It is in the discretion of a Judge at *nisi prius* to refrain from committing a witness for contempt in not answering, if it be sought by the questions put to elicit an admission of facts importing scandal upon himself; and especially so if the witness be intoxicated and not able to give evidence at all. *Marr v. Marr*, 3 U. C. C. P. 36. In an action upon a building contract the plaintiff tendered evidence to shew that the architect had acted maliciously in the rejection of materials, but the trial Judge required proof to be first adduced tendering to shew that the materials had been wrongfully rejected, reserving until that fact should be

established the consideration of the question whether notice was necessary to be proved, and, if necessary, what evidence would be sufficient to establish it. Upon this ruling, plaintiff declined to offer any further evidence, and the case upon judgment was granted for the defendants: Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling of evidence within the discretion of the trial Judge: *Yeates v. City of Toronto*, 25 S. C. R. 579. *Semble*, that the precise time at which upon a trial particular evidence may be introduced is for the Judge exclusively to determine: *Robinson v. Rapelle*, 4 U. C. R. 281. Upon a trial by jury the Judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying. And where the form of the charge was defective in this respect and consequently left the jury in a confused state of mind as to the questions in issue, a new trial was directed: *Alaska Packers' Association v. Spencer*, 10 B. C. R. 473. A Judge whether of the Supreme Court or of an inferior Court has, with respect to words uttered by him in the course of judicial proceedings with reference to the case before him, an absolute privilege: *Primrose v. Waterston*, 4 F. 783. Where it was evident from the conduct of counsel on both sides that they took it for granted that the trial Judge had knowledge of certain facts established in another action, which had been tried before him, with a jury, and out of which this action arose, and that for that reason no evidence was given of such facts:—Held, that the trial Judge might properly make use of his knowledge: *Pease v. Town of Moosomin*, 5 Terr. L. R. 207. There can be no valid objection to a Judge cautioning a jury against deciding from an enumeration of witnesses: *Tidy v. Tupper*, 12 O. W. R. 904. In a case tried with a jury if the jury brings in an informal contradictory or inconsequent verdict the Judge has the power and it is his duty to point out to the jury the defects in it, to give the necessary explanations, and to order the jury to reconsider and correct it: *Jolicoeur v. Grand Trunk R. W. Co.*, Q. R. 34 S. C. 457. There is no fixed rule of law defining the degree of misconduct which will justify the dismissal of a servant. The question is one of fact for the jury. But it is not for the Judge to decide whether there is any evidence to justify dismissal, and if there be no such evidence he should not submit to the jury an issue of the fact. He may also direct, guide and assist the jury by informing them of the nature of the acts which in law would justify dismissal, and of materiality of the facts to the issues raised: *Clouston v. Corry*, 75 L. J. P. C. 30; (1906) A. C. 122; 93 L. T. 700; 74 W. R. 282; 22 T. L. R. 107. The authorities on the subject of merely declaratory judgments are collected in Messrs. Holme and Lushington's *Commentaries on the Judicature Act*, etc., at p. 39. The case *Austen v. Collins*, 54

L. T. N. S. 903, was decided under Order 25, Rule 5, which is the same as our present enactment. There the learned Judge said: "The rule leaves it to the discretion of Court to pronounce a declaratory judgment when necessary, and it is a power which must be exercised with great care and jealousy: *Bunnell v. Gordon*, 20 O. R. 281. See also *Bogg v. Midland R. W. Co.*, L. R. 4 Eq. 310; *Lady Langdale v. Briggs*, 8 D. M. & G. 391.

RIGHT TO BEGIN.

It is often a subject of enquiry whether the plaintiff or the defendant is to open the facts and evidence to the jury. This may be an advantage, and is then claimed as a right, as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case; or it may be a burden, as where a party relies on the witnesses of his opponent or on the difficulty of the proofs incumbent on him. The right or obligation to begin generally depends on the nature of the issue, and also on the rules respecting the *onus probandi* at the commencement of the trial, and the test has been said to be not on which side the affirmative lies, but which side would be entitled to a verdict if no evidence be given: *Leete v. Gresham Insurance Co.*, 15 Jurist 1161, Ex. M. T. 1851. This test, however, is only another way of stating the common rule that he on whom the burden of proof lies must begin, for this must be ascertained before it can be determined which side is entitled to the verdict. As a general rule the proof lies on him who affirms, except in cases where the presumption of law or fact is in favour of the affirmative. It must, however, be borne in mind that regard must be had to the effect and substance of the issue, and not to its grammatical form: *Sword v. Leggatt*, 7 C. & P. 615; *Amos v. Hughes*, 1 M. & Rob. 464. The most general criterion that can be given as to the right to begin is that "he begins who in the absence of proof on either side would substantially fail in the action." In actions for libel, slander and injuries to the person, the plaintiff shall begin although the affirmative issue is on the defendant: *Mercer v. Whall*, 5 Q. B. 447, 462. The general rule as laid down in this case is that wherever the record shews that something, even damages only, is to be proved by the plaintiff, he ought to begin whether the action be in contract or tort. Where the damages are of ascertained amount or must be nominal, then it seems that the defendant may begin if the pleading will admit of it. Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he has a right to begin as to all: *Rawlins v. Desborough*, 2 M. & Rob. 320; *Collier v. Clark*, 5 Q. B. 467. The plaintiff in replevin has the same right as in other actions, though both parties are actors: *Curtis v. Wheeler*, M. & M. 493. In an action for the recovery of

land the defendant may in such cases, by admitting a title in the plaintiff, entitle himself to begin. Thus, where the plaintiff claims as heir at law, and defendant as devisee, it is the settled rule that the defendant by admitting plaintiff's pedigree and the dying seized may entitle himself to begin and rely: *Goodtitle & Revett v. Braham*, 4 T. R. 497. Generally in order to entitle the defendant to begin by admitting the plaintiff's case he must admit the whole without qualification: *Doe d. Pill v. Wilson*, 1 M. & Rob. 323. An erroneous ruling of the Judge as to the proper party to begin will not as a matter of course entitle the party to a new trial: *Bird v. Higginson*, 2 Ad. & E. 160. A clear case of error by which an undue advantage may have been given to the successful party or injustice done, is ground of new trial: *Ashby v. Bates*, 15 M. & W. 589. A new trial will not be granted for a misdirection as to the right to begin unless it appears that injustice may have been occasioned by it: *McDonald v. McHugh*, 12 U. C. R. 503. Defendants admitted policy, proofs of death, probate, etc., and accepted burden of proof at the trial, and claimed the right to begin: Held, the plaintiffs had the right to begin notwithstanding such admissions: *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120, 14 S. C. R. 330. In an action on a fire policy the only plea was a further insurance effected by the plaintiff without notice to defendants or indorsement on their policy on which issue was taken; and at the trial defendants admitted that if they should fail to prove their defence the plaintiff would be entitled to a verdict for the full amount insured: Held, that they were entitled to begin: *Jacobs v. Equitable Insurance Co.*, 19 U. C. R. 250. Where a party upon whom the onus of proof lies produced a receipt before the master, or other proof of a nature generally conclusive, and closes his evidence, and the other side produces testimony tending to shake this evidence, further evidence in support should be allowed to be produced, though in strictness it may be such as might have been produced in the first instance: *Moody v. McCann*, 1 Ch. Ch. 88. It does not necessarily follow, that because the plaintiff's witness when recalled to rebut the defendant's evidence makes statements which in fact amount to a new case for the plaintiff, the Judge must therefore refuse to allow such statements to go to the jury: *Devlin v. Crocker*, 7 U. C. R. 398. Right of plaintiff after closing his case to read papers proved by him but not filed or read: see *Cross v. Richardson*, 13 U. C. C. P. 433. A medical man called by the defendant stated from the evidence given by the defendant, and the evidence given throughout the case, he would not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery: Held, inadmissible: *Van Meter v. Farewell*, 12 O. R. 285. Where the defendant read to the jury letters of his own addressed to the plaintiff's attorney, and commented upon them, the

Court refused on that ground to allow the plaintiff's counsel to reply: *Atkinson v. Stewart*, 7 C. C. R. 297.

At the trial of a collision action, although the defendants have admitted that both vessels were to blame, it is still the plaintiff's duty to begin: *The Cadeby*, 78 L. J. P. 85; (1909), P. 257; 101 L. T. 48; 25 T. L. R. 623.

RIGHT TO REPLY.

In general the party who begins has a right to the general reply when the opposite party calls witnesses. Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entirely new case, which again the plaintiff controverts by evidence, the defendant's reply is confined to the new case set up by him, for upon that relied on by the plaintiff the defendant's counsel has already commented in the opening of his own case, and the plaintiff is then entitled to the general reply: *Roscoe*, 266. Unless the defendant give evidence the plaintiff is not entitled to reply, there being no new facts upon which his counsel can comment. As the defendant's counsel has to announce his intention to call witnesses at the close of the plaintiff's case, if he do not do so he would not be allowed to open fresh facts in his speech, for it has been held that when he has allowed the plaintiff's counsel to sum up, he cannot afterwards change his mind: *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227.

The defendant having adduced evidence, although only by way of putting in certain documents on the cross-examination of one of the plaintiff's witnesses: Held, 1. Following Best on the Right to Begin, section 132, and *Rymer v. Cook* (1865), Moo. & M. 86n., that plaintiff's counsel had the right to reply. 2. That the error of the Judge in refusing to allow the reply could only entitle the party to a new trial, if it appeared that the course of justice had been thereby interfered with, and some substantial injury done to the party complaining: *De J. Rother v. Brance* (1854), 5 C. R. 655; *Geach v. Ingall* (1868), 14 M. & W. 95, followed. 3. That in the present case the plaintiff could suffer nothing from the order in which the jury were addressed, as his evidence was weak and the defendants were entitled to the verdict, and that a new trial should not be granted: *Quintal v. Chalmers*, 12 M. L. R. 231 (Man.).

Application to remit action to the Court to take evidence after refusal to call witnesses: *Cardonald v. Worthington*, 7 A. R. 531, 9 S. C. R. 327.

A plaintiff is not allowed in presenting evidence to divide his case, either by omitting to give evidence originally upon a material point and offering such evidence in reply, or by giving some evidence upon some particular point in his original case, and offering other evidence upon the same point in reply: *Harvey v. The Canadian Pacific Ry.*

Co., 3 M. L. R. 266 (Man.), 9 S. C. R. 327. When points of law arise incidentally all the counsel on both sides are usually heard by the Court, and the leading counsel of the party making the objection or submitting the point alone replies. On the claim of the right to begin it was held in *Rawlins v. Desborough*, 2 M. & Rob. 70, that only one counsel is to be heard on each side. The objection of a witness to a question which he considers himself not bound to answer is not a point on which counsel in the cause are heard: *R. v. Adcy*, 1 M. & Rob. 94. Where the party conducts his case, addresses the jury, and examines witnesses in person, it is questionable whether counsel can be heard for him on a point of law: *Moscatti v. Lawson*, 1 M. & Rob. 454. The probability is that in the present state of the law counsel could be heard. It has been decided that a party who conducts his own case cannot on that account be excluded from giving evidence as a witness: *Cobbett v. Hudson*, 1 E. & B. 11. Where the defendants have the same interest, senior counsel alone may address the jury, while witnesses can be examined by counsel successively: *Chippendale v. Masson*, 4 Camp. 174. Where the defendants appear by the same solicitor and plead a joint defence, the practice is to hear one counsel only: *Perring v. Tucker*, M. & M. 392. The order in which co-defendants shall examine and address seems to be in the Judge's discretion: *Fletcher v. Crosby*, 2 M. & Rob. 417. Set-off and counter-claim are now in the same position as if they formed a statement of claim by the defendant against the plaintiff. Where the defendant claims to be entitled to contribution or indemnity over against any party not a party to the action, the defendant may bring him in. The directions for trial given by the Court or Judge will regulate the manner in which the questions are to be tried, and the third party may have leave to defend the action. The defendants appeared by the same attorney and their defence was in substance precisely the same, but they were represented at the trial by separate counsel. On examination of one of the plaintiff's witnesses both counsel claimed the right to cross-examine the witness: Held, that only one counsel could cross-examine the witness: *Walker v. McMillan*, 6 S. C. R. 241.

ADDRESSES TO JURY.

The Consolidated Rules, 1897, provide: *

548. (1) At the trial the addresses to the jury shall be regulated as follows:—

(a) At the conclusion of the case of the party who begins, if the opposite party states his intention to be not to adduce evidence,

Addresses
of counsel
at trial.

* Compare

B. C. Rule, 358.

N. S. Rules, Order XXXIV., s. 29.

N. W. T., c. 21, Order XXV., s. 259.

and he has not adduced evidence, the party who begins shall have the right to address the jury a second time at the close of his case for the purpose of summing up the evidence, and the opposite party shall have the right to reply.

(b) If the opposite party does not state his intention to be not to adduce evidence, or if he has adduced evidence, he shall have the right to open his case, and (after the conclusion of such opening) to adduce such evidence as he thinks fit, and where all the evidence is concluded to sum up the evidence, and the party who begins shall have the right to reply.

(2) Where a defendant claims a remedy over against a co-defendant, he shall have the right to address the jury after the co-defendant.

(3) Where a party is represented by counsel, the right conferred by this Rule shall be exercised by his counsel.

The Rule 548 allows the defendant's counsel to sum up his evidence, but does not permit the counsel to comment generally on the case: *Gilford v. Davis*, 2 F. & F. 23; but it must be observed that the summing up usually amounts to a general reply. Where there are several issues, some of which are incumbent on the plaintiff and others on the defendant, it is usual for the plaintiff to begin and to prove those which are essential to his case: *Jackson v. Heskeith*, 2 Start. 521. The defendant then does the same, and the plaintiff is then entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to comment by way of reply upon such last mentioned evidence in support of his own affirmative, and the plaintiff's counsel has a general reply. Where the Judge decides that there is no evidence to go to the jury on the plaintiff's case, his counsel will not be entitled to sum up: *Hodges v. Ancrum*, 11 Ex. Ch. 214. Where a single fact or transaction forms the whole subject of dispute between the parties on the pleadings, which is affirmed on one side and denied on the other, counsel for the plaintiff is bound to open the whole case in chief; and cannot go into general evidence in reply. Thus, where the plaintiff's title to a mine was in issue, and the plaintiff relied on *prima facie* evidence from possession, he was considered not to be entitled to support his case in reply by the general evidence of his title: *Lacon v. Higgins*, 3 Stark. 178; but where the defendant traverses and also justifies, the plaintiff may reserve his case on the justification until the defendant has proved it. Or, he may enter upon the disproof in the first instance, in which case he will not be allowed to give further evidence of the same kind in reply: *Browne v. Murray*, Ray. & M. 254. Where a party tenders documentary evidence *prima facie* admissible, the other party will not be allowed to interpose with evidence for the purpose of excluding it; but evidence to disprove possession of an

instrument of which secondary evidence is tendered: *Harvey v. Mitchell*, 2 M. & Rob. 366; or to shew that a contract about which the witness is questioned is in writing: *Cox v. Couvless*, 2 F. & F. 139, may be given immediately. Where the Judge has expressed an opinion adverse to the admissibility in evidence of the document, the counsel seeking to put it in must formally tender it in evidence, and require a note to be taken of the tender; and if this course is neglected the rejection cannot afterwards be relied upon: *Campbell v. Loader*, 34 L. J. Ex. 50. Both parties are bound by the view taken of their respective cases, and the mode of conducting them by their counsel at the trial; and they cannot move for a new trial upon grounds omitted to be urged at *nisi prius*: *Haslor v. Carpenter*, 3 C. B. N. S. 172; and where counsel offers evidence for one purpose which the Judge rejects, he will not after the trial be permitted to rely upon it as admissible for another purpose: *R. v. Grant*, 5 B. & Ad. 1081; nor can he complain of misdirection upon a point which he has in effect waived at *nisi prius*: *Robinson v. Cook*, 6 Taunt. 336; and misstatements of fact by the Judge should be adverted to by counsel at the time, though counsel need not object to the law as laid down by him: *Payne v. Ibbotson*, 27 L. J. Ex. 341; and where evidence has been admitted without objection as relevant to the issue, it cannot be objected to as inapplicable after the Judge has begun to sum up: *Abbott v. Parsons*, 7 Bing. 563. Where the Judge has in the opinion of counsel omitted to submit some material point or view of the case to the jury, he ought it seems to be reminded of it: *Major v. Chadwick*, 11 Ad. & E. 584; but counsel will not be taken to have acquiesced in the summing up of the Judge in point of law merely because he has not interposed at the time: see *Hughes v. G. W. R. Co.*, 14 C. B. 637. Where the point relied on by counsel has been distinctly brought under the notice of the Judge in the course of the cause, it would be very inconvenient to require that counsel should again advert to it by way of protest, while the Judge is charging the jury. A party appearing in person must examine the witnesses as well as address the jury: *Shuttleworth v. Nicholson*, 1 M. & Rob. 254. The party in person may conduct his own cause, examine witness, and give evidence in his own favour: *Cobbett v. Hudson*, 1 E. & B. 11; but his wife cannot claim to conduct it in his absence: *S. C.*, 15 Q. B. 988. A barrister has no privilege to be heard both personally and by his counsel in his own cause: *Newton v. Chaplin*, 10 C. B. 356. The leading counsel has a right in his discretion to interpose and take the examination of a witness out of the hands of his junior, but after one counsel has brought the examination to a close, a question cannot be regularly put to the witnesses by another counsel on the same side: *Doe v. Roe*, 2 Camp. 280. Counsel for the defendant in addressing the jury has no right to ask them whether they are satisfied that defendant is entitled to a

verdict as the case stands without calling witnesses: *Moriarty v. Brooks*, 6 C. & P. 684. Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders: *International Bridge Co. v. Canadian Southern R. W. Co.*, 7 A. R. 226, 8 A. C. 723. But see 19 C. L. J. 358. Observations on the duty of counsel when dissatisfied with the ruling of the Judge at *nisi prius*: *Parsons v. Queen Ins. Co.*, 43 U. C. R. 271. Under section 157, C. L. P. Act, 1856, plaintiff's counsel has no right to address a jury a second time after the address of the defendant's counsel, unless the latter call witnesses: *Gibson v. Toronto Roads Co.*, 3 L. J. 11. Counsel may read a reported case to the jury, in order to shew the law, and for that purpose may refer to the facts; but he cannot go into facts to shew how a former jury treated the same or analogous facts, and thus argue as to what the verdict should be: *Dougherty v. Williams*, 32 U. C. R. 215. Defendant's counsel told the jury that a verdict in favour of the plaintiffs for any sum would carry costs: *Quære*, as to the right to make such statement; but *semble*, that the objections to a verdict for the plaintiff founded upon it, would apply equally to a verdict for defendant: *Carriek v. Johnston*, 26 U. C. R. 69. Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial Judge claimed; and where this has not been done, the Court will not interfere upon appeal: *Sornberger v. Canadian Pacific R. W. Co.*, 24 A. R. 263. Counsel has no authority to agree to the reference of an action in disregard of the conditions imposed by his client on such reference: *Neale v. Gordon-Lennox*, 71 L. J. K. B. 939; (1902), A. C. 465; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757. The rules of etiquette as between members of the legal profession have no effect beyond their relations *inter se* and do not in any way affect the legal relations between solicitor and client. If such rules are enforceable, it is only because the members of the profession choose to govern their conduct by reference to them. A solicitor cannot therefore brief a counsel whom his client has instructed him not to brief, and charge the client with the fees and other expenses incurred in delivering the brief, merely because the counsel is entitled to a brief under the rules of professional etiquette. The solicitor's proper course in such circumstances is either to explain the rule to the client and say that he must state the facts to any other counsel whom he briefs, and that such counsel may probably return the brief, or to say that he is himself so clearly governed by the rules and etiquette of the profession that if he is not allowed to brief the counsel in question he must throw up his retainer: *Harrison, In re*, 77 L. J. Ch. 143; (1908), 1 Ch. 282; 97 L. T. 992; Held, that counsel for the plaintiff, in opening to the

jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial: *Bradenburg v. Ottawa Electric R. W. Co.*, 19 O. L. R. 34.

QUESTIONS TO JURY.

The Ontario Judicature Act provides:—

112. Upon a trial by jury, in any case except an action for libel, In certain cases the slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict; and, on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered. *judgment can be entered on answers.*

C. R. 781 is as follows:—

781. (1) Where the jury is directed to answer questions of fact, and answers some but not all of them, or the answers are conflicting so that judgment cannot be entered on such findings, it shall not be necessary to move to set aside such findings, but the action may proceed as in the case of a disagreement of the jury.

(2) Where the answers entitle a party to judgment as to some, but not all of the causes of action, the Judge may direct judgment to be entered as to those of the causes of action as to which the findings are sufficient to entitle the party to judgment, and it shall not be necessary to move to set aside the findings as to other causes of action, but the action may, as to such last mentioned causes of action, proceed as in the case of a disagreement of the jury.

Where the jury, in answering questions submitted to them, fail to answer a material question, upon which their answers to other questions depend, their findings will be set aside and a new trial ordered. Assuming that the Court has power to supply a finding, on a point not answered by the jury, it will not do so in a case where the evidence is not clear or where it is conflicting: *Blois v. Milland R. W. Co.*, 39 N. S. R. 242.

Where a verdict is attacked for non-direction, the onus is upon the attacking party to shew that the proper instructions were asked for and refused. And where the charge of the trial Judge has placed the case as a whole correctly before the jury, and no injustice has been done by the verdict, and no substantial miscarriage of justice has resulted, a new trial will not be allowed for non-direction which has not materially affected the result: *Burrill v. Sanford*, 27 N. S. R. 535.

In an action under the statute C. S. N. B. 1903, s. 79, for compensation for death of plaintiff's wife, the jury should be simply asked if the defendant was guilty of negligence causing the death, and if so, in what did such negligence consist. If irrelevant and unnecessary questions are asked, and the Judge's charge in respect to them is not warranted by evidence relevant to the issue, a new trial will not be granted unless the effect thereof is to prejudice the minds of the jury as to the real question to be tried: *per Barker, J., Collins v. City of St. John*, 38 N. B. R. 86.

The only object in submitting questions to a jury is to ascertain if they apprehend the case; but if the Judge does not submit questions, it is no ground for a new trial, if he has properly instructed the jury on the law: *Snow v. Crow's Nest Pass Coal Co.*, 13 B. C. R. 145.

By mistake one sheet of paper containing five questions for the jury was lost. The questions were in consequence not answered. They related to one cause of action out of three. The plaintiff was held entitled to his judgment on the causes disposed of by the jury and to go to trial on the other cause not disposed of: *Ford v. Canadian Express Co.*, 1 O. W. N. 119.

No questions having been given to the jury by the trial Judge, the jury prepared questions of their own and answered them. While this memorandum is no part of the evidence it cannot be disregarded on the question of a new trial: *Gilchrist v. Grand Trunk* (1909), 14 O. W. R. 9. In an action for breach of contract the defendant alleged that the contract was conditional and the following question was submitted to the jury: "If such an agreement existed, was it a conditional one?" To which the jury answered: "No satisfactory proof that it was." Held, that this was not an answer to the question: *Crockett v. Campbellton* (1909), 39 N. B. R. 160. The Judge is not bound under the O. J. Act to submit questions in writing to the jury: *Lett v. St. Lawrence and Ottawa R. W. Co.*, 11 S. C. R. 422; *Hinton v. St. Lawrence & Ottawa R. W. Co.*, 1 O. R. 545. R. S. O. 1877, c. 50, s. 264, makes it imperative upon the jury to answer questions submitted to them, and prohibits them from giving a general verdict instead. But the Judge, after having put questions, may nevertheless in his discretion receive a general verdict: *Furlong v. Carroll*, 7 A. R. 145. It was objected that a false representation alleged by defendant had not been found to be false to the knowledge of the plaintiff company: Held, that a question with regard to such representation put to the jury having been assented to by counsel on both sides as one the finding on which would be decisive, it was too late to take this objection; and the effect of the finding must be taken to be that the plaintiffs knew the representation to be false: *Star Kidney Pad Co. v. Greenwood*,

5 O. R. 28. Where a question was not put to the jury until after they had rendered their verdict and answered the other questions submitted to them, and after the Judge had been moved for judgment upon these answers, but it was done while all the parties and their counsel were present, and before the jury had left the Court room: Held, that the question had been properly put: *McLaren v. Canada Central R. W. Co.*, 32 U. C. C. P. 324, S. A. R. 567.

INSPECTION OF PROPERTY.

By Ontario Consolidated Rules of Practice and the Ontario Jurors' Act, Ont. Statutes 1909, c. 34, provision is made for inspection of property and view by jurors as follows:—

570. The Judge by whom any cause or matter is tried, with or Judge without a jury, or before whom any cause or matter is brought by way of appeal, may inspect any property or thing concerning which inspect. any question arises therein.

571. A party in a cause or matter may apply to the Court or a Judge for an order for the inspection by the jury or by himself or of real or by his witnesses, of any real or personal property, the inspection of personal property which may be material to the proper determination of the question by jury, in dispute, and the Court or a Judge may make such order upon such parties or terms as to costs and otherwise as the Court or Judge may think fit. witnesses.

VIEW BY JURORS.

572. Upon any application for a view by a jury, there shall be an Party re-affidavit stating the place at which the view is to be made, and the quiring distance thereof from the sheriff's office. Unless the Court or Judge view to otherwise orders, the party obtaining the order for the view shall deposit with the sheriff the sum of \$25 in case of a common jury, and deposit with Sher- \$34 in case of a special jury, if such distance does not exceed 5 ff sum to miles; and \$31 in case of a common jury, and \$43 in case of a special pay ex-jury, if the distance be above 5 miles, and if such sum shall be more penses. than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the party who obtained the view or his solicitor, and if such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such party or his solicitor to the sheriff.*

C. R., 570, 572.

* Compare

B. C. Rules, 514 to 516.

R. S. Man., c. 40, ss. 581 to 583.

R. S. N. B.

N. S. Rules, Order L., ss. 4 and 5.

Section 86 of the Ontario Jurors Act, Ont. Statutes, 1909, c. 34, is as follows:—

View by
jurors.

86. (1) Where in an action whether the same is to be tried by a special or by a common jury, it appears to the presiding Judge that in order to the better understanding of the evidence the jurors who are to try the issues ought to have a view of the place or of the real or personal property in question whether the same be within or without the county in which the trial is to take place, he may at any time after the jurors have been sworn and before they give their verdict order that the jurors shall have such view.

Terms of
order.

(2) The order may be made on such terms as to costs and the adjournment of the trial and otherwise, as may be deemed just, and shall contain directions to the sheriff as to the manner in which and the persons by whom the place or the property in question shall be shewn to such jurors and any other directions which, under the circumstances, the Judge may think proper.

BLACKSTONE (*Continued*).

When the evidence is gone through on both sides, the Judge in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence. The jury after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict, and in order to avoid intemperance and causeless delay, ~~are to be kept without meat, drink, fire or candle,~~ unless by permission of the Judge, till they are all unanimously agreed. But if our juries eat or drink at all, or have any eatables about them without consent of the Court, and before verdict, it is fineable, and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents after they are gone from the bar, or if they receive any fresh evidence in private, or if to prevent disputes they cast lots for whom they shall find, any of these circumstances will entirely vitiate the verdict. When they are all unanimously agreed the jury return back to the bar, and before they deliver their verdict the plaintiff is bound to appear in Court by himself, attorney or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned, in case he fails in his suit, as a punishment for his false claim. To be amerced or *a mercie* is to be at the King's mercy with regard to the fine to be imposed: in *miser cordia domini regis pro falso clamore suo*. The amercement is disused, but the form still continues, and if the plain-

tiff does not appear no verdict can be given, but the plaintiff is said to be nonsuit, *non sequitur clamorem suum*. Therefore it is usual for a plaintiff when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited or withdraw himself, whereupon the crier is ordered to call the plaintiff; and if neither he nor anybody for him appears he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is that a nonsuit is more eligible for the plaintiff than a verdict against him, and after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint. But in case the plaintiff appears, the jury by their foreman deliver in their verdict. Another method of finding a species of special verdict is when a jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the Judge or the Court above on a special case stated by the counsel on both sides with regard to a matter of law. When the jury have delivered in their verdict, and it is recorded in Court, they are then discharged. And so ends the trial by jury.

VERDICT.

The Ontario Judicature Act provides as follows:—

111. Upon a trial by a jury, it shall not be lawful for the jury to give a general verdict, where the Court or the presiding Judge otherwise directs, and it shall be the duty of the jury to give a special verdict if the Court or presiding Judge so directs; and the jury may give either a general or a special verdict, unless the Court or the presiding Judge otherwise directs; but this section shall not apply to actions of libel.

The trial of an action for slander having been concluded, the Court adjourned at 6 p.m., both parties agreeing to a sealed verdict. A sealed envelope was left with the sheriff's officer for the Judge, with a paper enclosed signed by all the jury, directing that the defendant should "pay the sum of \$1 damages, and the costs of the suit." Held, that on this being opened in Court by the Judge next morning, the jury should have been called together as the plaintiff's counsel required, to assent to the verdict and have it recorded, and it having been simply indorsed on the record as written, a new trial was ordered without costs: Held, also, that the jury had no power to give costs by their verdict: *Campbell v. Linton*, 27 U. C. R. 563. A verdict cannot be taken subject to the opinion of the Court without the consent of both parties: *Bletcher v. Burn*, 24 U. C. R. 124. Where a jury were allowed to disperse without arriving at a verdict,

but on re-asse- bling in the jury box next morning were treated by Judge and counsel as the same jury, and being interrogated declared themselves agreed upon one of several issues in the action, but not upon the others; and the Judge recorded their verdict on the one issue, and discharged them: Held, that all irregularities in regard to the dispersal over night had been waived, and the issue upon which the jury had agreed must upon any further prosecution of the litigation be regarded as having been fully disposed of by the verdict: *Coleman v. City of Toronto*, 23 O. R. 345. The evidence at the trial of this action not being concluded before the close of the day preceding Good Friday, the Judge, counsel consenting, and the jury desiring it, adjourned the Court to the following day, when he delivered his charge and received the verdict on which he entered judgment: Held, that it was competent for him to do so. The only day on which no judicial act can be done in this province is the Lord's Day or Sunday. Other statutory holidays are not *dies non juridici* in this sense: *Foster v. Toronto R. W. Co.*, 31 O. R. 1. Although the Judge does not direct a non-suit, yet where the plaintiff in deference to the Judge's opinion chooses to become non-suit, he is entitled to a new trial when it appears that the Judge took an erroneous view of the law. *Domville v. Davies*, L. R. & G. 159, followed: *Wright v. Morning Herald Co.*, 2 R. & G. 398; 2 C. L. T. 106 (N.S.). Plaintiff may become non-suit at any time before the delivery of the verdict: *Grant v. Protection Ins. Co.*, 1 Thom. (1st Ed.) 10; (2nd Ed.) 12 (N.S.); *Copp v. Etter*, James, 304 (N.S.).

Held, that neither the trial Judge nor the Court could enter a non-suit against the plaintiff's desire: *Rajotte v. Canadian Pacific Ry. Co.*, 5 M. L. R. 365 (Man.).

The terms of an oral contract were in question. The plaintiff and defendant being the only witnesses on the point, each swore positively to his version of the contract. Counsel for each of the parties at the trial proposed certain questions, asking that they be submitted to the jury, and objecting to the submission of the questions proposed by the other side. The Judge submitted both sets of questions, but directed the jury that they were at liberty either to answer the questions, and thus give a special verdict, or give a general verdict. The jury gave a general verdict for the plaintiff. On a motion by the defendant to set aside the verdict:—Held, that the question of there being a mistake or no *consensus ad idem* did not arise, and that the verdict depended on the jury's view of the credibility of the parties, and that therefore the verdict should not be disturbed: *Newson v. McLean*, 2 Terr. L. R. 4.

Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence is less strict than it was before the parties

were admissible as witnesses: *Canadian Bank of Commerce v. McMillan*, 31 U. C. R. 596.

If the party who has been served with process and appeared to defend the action, bears the same name as the party proved to be liable, the plaintiff is entitled to a verdict, &c., unless the party served shews that he is not the proper defendant: *Thayer v. Vance*, 2 Thom. 269 (N.S.).

Where the trial of a cause begins, and is entered into with or without a jury, as the case may be, it must be finished in like manner unless by consent of parties: *Denmark v. McConaghy*, 29 U. C. C. P. 563. *Semble*—A Judge has not power to attach conditions to a verdict the day after it was rendered and the jury discharged—Tuck, J.: *Bank of Nova Scotia v. Wish*, vol. 32, 434 (N.B.). The Court can, in its discretion, alter verdict to give it its legal effect: *Cochran v. Chipman et al.*, 2 R. & C. 254 (N.S.). Held, that the trial Judge was within his right and duty in sending the jury back to re-consider their findings after pointing out their inconsistency: *Peuchen v. Imperial Bank*, 20 O. R. 325.

Power of Judge on trial to direct verdict for plaintiff subject to be set aside and verdict to be entered for defendant upon points reserved. This can only be effected by the jury finding a special verdict when no consent is given: *Hughes v. Sutherland*, 1 Kerr. 574 (N.B.). A Judge may refuse to allow counsel to address the jury and urge them to give a verdict contrary to his direction: *Doe dem Moffatt v. Thompson*, 1 P. & B. 516 (N.B.). There is nothing to prevent a Judge directing the jury to find on equitable issues. In this case the jury having found for the defendants, the Court on the evidence directed judgment to be entered for the plaintiff: *Rae v. McDonald*, 13 O. R. 352. Where in the course of the trial of an action before a Judge and jury a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict and of fully hearing and considering the motion: if necessary, after the verdict, the Judge may in a proper case nonsuit the plaintiff notwithstanding a verdict of the jury in his favour. *Perkins v. Dangerfield*, 51 L. T. N. S. 535, and *Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644, distinguished. *Floer v. Michigan Central R. W. Co.*, 27 A. R. 122, 127, specially referred to: *Macdonald v. Mail Printing Co.*, 32 O. R. 163. *Semble*, that the Judge may amend a verdict with the assent of the jury at any time before they are discharged: *Jordon v. Marr*, 4 U. C. R. 53. Held, that where by mistake a verdict for a certain amount is entered on the record, and the foreman of the jury before the jury separate or leave the box, points out the error, the Judge is right in erasing the entry and making in lieu thereof another, to which the jury have

assented as being their verdict: *Moore v. Boyd*, 15 U. C. C. P. 513. In an action against the defendant as a surgeon for negligence, the jury found for the plaintiff, but added to their verdict the following: "We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention:" Held, a mere expression of opinion, and that it did not nullify or affect the verdict: *Sheridan v. Pidgeon*, 10 Q. R. 332. Chapter 45, section 29, of the Consolidated Statutes provides that if a jury cannot agree within two hours any five of the seven may return a verdict. Effect of want of unanimous answers to all questions considered. *Cheesman v. Hatheway*, vol. 23, 415 (N.B.).

C. R. 779 is as follows:—

Judgment
of nonsuit

779. A judgment of nonsuit shall, unless otherwise directed, have the same effect as a judgment upon the merits for the defendant, but may be set aside on such terms as may seem just.

DISAGREEMENT OF JURY.

C. R. 780 is as follows:—

Motion for
judgment
where jury
disagree.

780. If the jury disagree and find no verdict, the Judge at or after the trial may notwithstanding dismiss the action.

WITHDRAWING JUROR.

Sometimes a juror is withdrawn or the jury discharged by consent, either for the convenience of the parties, or at the suggestion of the Judge. In such case each party pays his own costs, but in the last-mentioned case the action is not thereby determined: *Everett v. Youells*, 3 B. & Ad. 349. Counsel had at common law a general authority to withdraw a juror: *Strauss v. Francis*, L. R. 1 Q. B. 379. Where a juror has been withdrawn on terms which the defendant afterwards refuses to carry out, such refusal does not terminate the action and the Court will grant a new trial: *Norburn v. Hellian*, L. R. 5 C. P. 129. If the jury cannot agree at the close of the assizes, the Judge may in his discretion and without consent, discharge them: *Newton's Case*, 13 Q. B. 716. The withdrawal of a juror at a trial has the effect of concluding the suit, and with it of determining the whole cause of action: *Flake v. Clapp*, 8 P. R. 62.

DAMAGES.

Assessment
of
damages.

552. Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment.*

* Compare

B. C. Rule, 364. N. S. Rules, Order XXXIV., s. 46.
R. S. Man., c. 40, s. 556. R. S. N. W. T., c. 21, s. 244,
R. S. N. B.

The right of the trial Judge to refer the question of damages is indisputable: *Ratte v. Booth*, 16 P. R. 185. See 21 S. C. R. 635.

When it is shewn that damages must have resulted from a breach of contract, the exact amount of which cannot be ascertained, it is in the discretion of the Court to determine the same equitably as a jury should do: *Webster v. International Cotton Co.*, Q. R. 29 S. C. 470.

The amount of damages awarded in the discretion of the trial Judge should not be interfered with on appeal unless clearly unreasonable and unsupported by the evidence, or for error in law or fact, or partiality of the Judge: *Levi v. Reed*, 6 Can. S. C. R. 482, and *Gingras v. Desilets*, Cass. Dig. (2nd ed.) 212, followed: *Cossette v. Dunn*, 18 S. C. R. 222.

A plaintiff giving evidence on his own behalf cannot be allowed to state that he has sustained a certain amount of damages by the act of the defendant; he should state the facts on which he relies to prove his damages from which the jury are to determine the amount: *Domville v. Keevan*, Easter T., 1871, and *Ryan v. James*, 1 Pug. 122 (N.B.).

Where a contract provided that upon non-completion by a fixed date a contractor was to pay or "allow" \$10 a day until completion: Held, that this authorized a deduction as liquidated damages of the amount so "allowed," from the contract price, even as against lienholders claiming adversely to the contractor other than those having liens for wages where such wage liens were less in the aggregate than ten per cent. of the contract price: *McBean v. Kinnear*, 23 O. R. 313.

Where a contract provides that an engine shall be built and placed in position by a certain date with a penalty for each day's delay, the time of commencement is of the essence of the contract, and if owing to the purchaser's fault the contractor is materially delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser if the work be not completed by the time fixed, being entitled only to actual damages: *Holme v. Guppy*, 3 M. & W. 287, followed: *Kear Engine Co. v. French River Tug Co.*, 21 A. R. 160. Affirmed, 24 S. C. R. 703.

Under a covenant contained in a lease granting a right of way over certain lands to a railway company for the purpose of a switch to a gravel pit, the lessees on default in removing the tracks and ties from the land within fifteen days from the termination of the

C. R. 552.

Compare

B. C. Rule, 364.

N. S. Rules, Order XXXIV., s. 46.

R. S. Man., c. 40, s. 556.

R. S. N. W. T., c. 21, s. 244.

lease were to forfeit and pay to the lessor \$5 a day as liquidated damages, and not as a penalty for each day after the said time that the lands and premises should remain in any way obstructed: Held, that such damages were liquidated. Held, however, that under the circumstances set out in the judgment, this was a proper case in which to grant relief under s. 52, s.-s. 3, of the Ontario Judicature Act, 1895, by awarding actual damages estimated on a liberal scale: *Townsend v. Toronto, Hamilton and Buffalo R. W. Co.*, 28 O. R. 195.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become exceptionally burdensome or even impossible: *Grant v. Armour*, 25 O. R. 7.

Loss of profit sustained by and the expenses which a purchaser of lands had been put to on a re-sale by him unknown to his vendor before such purchaser has entered into a binding contract for purchase, are not damages naturally flowing from the breach of the latter agreement, and cannot be recovered against him by his vendor. In such a case if recoverable at all the true measure of damages would be the increased value of the land at the time of the breach over the purchase money: *Loney v. Oliver*, 21 O. R. 89.

INTEREST.

The Ontario Judicature Act provides:—

Interest may be allowed as hitherto. When allowed on debts certain and overdue.

113. Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.

114. (1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable.

(2) If such debt or sum is payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of the demand.

When by way of damages in certain actions.

115. In actions for conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon.

Interest on judgments.

116. Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any

proceedings in the action, whether in the Court in which the action is pending or in appeal.

By the Ontario Judicature Act, 1897, s. 113, "Interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it." The effect of this enactment is that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right: *Toronto Railway v. Toronto City*, 75 L. J. P. C. 36; (1906) A. C. 117; 96 L. T. 646; 22 T. L. R. 32.

R. S. C. c. 120, The Interest Act, is as follows:—

RATE OF INTEREST.

1. This Act may be cited as the Interest Act. Short title.
2. Except as otherwise provided by this or any other Act of the Parliament of Canada, any person may stipulate for, allow and exact on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.* No restriction as to rate except as provided by statute.
3. Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of parties, or by law, and no rate is fixed by such agreement, or by law, the rate of interest shall be five per centum per annum. Five per centum to be rate if no other provision.
4. Except as to mortgages on real estate, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per centum per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent. When rate not per annum, contracted for only 5 per centum recoverable unless equivalent rate per annum stated.
5. If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may be recovered back or deducted from any principal or interest payable under such contract. Recovery of sum paid otherwise.

INTEREST ON MONEYS SECURED BY MORTGAGE ON REAL ESTATE.

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an

* See the Money Lenders' Act, R. S. C. c. 122, *post*, page 193.

less mortgage states actual rate advance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced unless the mortgage contains a statement showing the amount of such principal money, and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance.

No rate recoverable beyond that so stated. 7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable on the principal money advanced than the rate shown in such statement.

No fine, etc., allowed on payments in arrears. 8. No fine, or penalty, or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear; provided, that nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal, at any rate not greater than the rate payable on principal money not in arrear.

Over-charge may be recovered back. 9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable, or recoverable, under the three sections last preceding, such sum may be recovered back or deducted from any other interest, fine, or penalty, chargeable, payable, or recoverable on the principal.

No further interest payable after five years on certain conditions. 10. Whenever any principal money or interest secured by mortgage of real estate is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage, then, if at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage, tenders or pays to the person entitled to receive the money, the amount due for principal money and interest to the time of payment as calculated under the provisions of the four sections last preceding, together with three months further interest in lieu of notice, no further interest shall be chargeable, payable, or recoverable at any time thereafter, on the principal money, or interest due under the mortgage. Provided that nothing contained in this section shall apply to any mortgage upon real estate given by a joint stock company or other corporation, nor to any debenture issued by such company or corporation, for the payment of which security has been given by way of mortgage on real estate.

Preceding sections apply only to mortgages since July 1, 1880. 11. The provisions of the five sections last preceding shall apply only to moneys so secured by mortgage executed after the first day of July one thousand eight hundred and eighty.

BRITISH COLUMBIA, SASKATCHEWAN, ALBERTA, AND THE
TERRITORIES.

12. The three sections next following apply to the provinces of British Columbia, Saskatchewan and Alberta, and to the North-west Territories and the Yukon Territory only.

13. Every judgment debt shall bear interest at the rate of five per centum per annum until it is satisfied.

Interest on judgment at 5 per centum

14. Unless it is otherwise ordered by the Court, such interest shall be calculated from the time of the rendering of the verdict or the giving of the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same Court or in appeal.

From what time calculated.

15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any Court whatsoever in any civil proceeding shall for the purpose of this Act be deemed to be a judgment debt.

Judgment debts defined

The provisions of the Dominion Act respecting Money-lenders, R. S. C. c. 122, must be read with the Interest Act, *supra*.

1. This Act may be cited as the Money-lenders Act.

Short title.

2. "Money-lender" in this Act includes any person who carries on the business of money-lending, or advertises or announces himself, or holds himself out in any way, as carrying on that business, and who makes a practice of lending money at a higher rate than ten per centum per annum, but does not comprise registered pawnbrokers as such.

Definition. "Money-lender."

3. This Act shall not apply to the Yukon Territory.

Not applicable to Yukon.

4. This Act shall not apply to any loan or transaction in which the whole interest or discount charged or collected in connection therewith does not exceed the sum of fifty cents.

Limitation as to small loans.

5. Nothing in this Act shall operate to increase the rate of interest that may be recovered in any case where by law the rate is fixed at less than twelve per centum per annum.

Act not to increase existing rate of interest

6. Notwithstanding the provisions of the Interest Act no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per centum per annum; and the said rate of interest shall be reduced to the rate of five per centum per annum from the date of judgment in any suit, action, or other proceeding for the recovery of the amount due.

Interest on negotiable instruments. Maximum rate 12 per centum per annum

Powers to
Court for
inquiry in-
to transac-
tion and
relief of
debtor.

7. In any suit, action, or other proceeding concerning a loan of money by a money-lender, the principal of which was originally under five hundred dollars, wherein it is alleged that the amount of interest paid or claimed exceeds the rate of twelve per centum per annum, including the charges for discount, commissions, expenses, inquiries, fines, bonus, renewals, or any other charges, but not including taxable conveyancing charges, the Court may re-open the transaction and take an account between the parties and may notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation, re-open any account already taken between the parties, and relieve the person under obligation to pay from payment of any sum in excess of the said rate of interest; and if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it, and may set aside, either wholly or in part, or revive or alter any security given in respect of the transaction.

Lender to
repay
excess.

Exception
in case of
negotiable
instru-
ment.

8. The bona fide holder before maturity of a negotiable instrument discounted by a preceding holder at a rate of interest exceeding that authorized by this Act, may nevertheless recover the amount thereof, but the party discharging such instrument may reclaim from the money-lender any amount paid thereon for interest or discount in excess of the amount allowed by this Act.

Act to ap-
ply to
existing
contracts.

9. The principal of any sum of money originally under five hundred dollars, due and payable before the thirteenth day of July one thousand nine hundred and six, in virtue of any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender in respect of money lent by him, shall not, from and after the said date, bear a rate of interest greater than twelve per centum per annum; and from and after the said date no rate of interest greater than five per centum per annum shall be recovered upon any judgment rendered before the said date, upon any such negotiable instrument, contract, or agreement, for the payment of money lent by a money-lender, and which allows a greater rate than five per centum per annum.

And to
existing
judgments

As to in-
struments
and con-
tracts not
yet ma-
tured.

10. In the case of any such negotiable instrument made before the thirteenth day of July one thousand nine hundred and six, and maturing after the said date, and in the case of any such contract or agreement made before the said date and to be performed thereafter, the foregoing provisions of this Act shall apply only from the date of maturity or performance as the case may be.

Penalty.

11. Every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding one thousand dollars, who lends money at a rate of interest greater than that authorized by this Act.

To entitle a creditor to interest under 3 & 4 Wm. IV., c. 42, s. 28 (Imp.), the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future: *Sinclair v. Preston*, 31 S. C. R. 408. Interest is recoverable on goods sold on credit from the date at which the credit expired, where such is the usage of trade at the place where the goods are sold, although there may have been no previous dealings between the parties, no engagement to pay interest, and no notice under the statute that interest would be claimed: *Bannerman et al. v. Fullerton*, 1 Old. 200 (N.S.). The proper mode of computing interest in the absence of payments made especially on account of principal, is to compute it on the amount due up to the time of each payment, making rests, deducting the payments and charging interest on the balance: *Bettes v. Farewell*, 15 U. C. C. P. 450. Section 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than 7 per cent., and if, under such contract, interest is paid in excess of that rate, it cannot be recovered back: *Williams v. Canadian Bank of Commerce*, 13 B. C. R. 70. In an action to recover principal and interest on certain promissory notes, bearing interest at 12 per centum "as well after as before maturity," the defendant pleaded s. 80 of the Bank Act: Held, reading ss. 80 and 81, together, that such a contract between the bank and the customer is merely invalid in so far as it stipulates for more than 7 per cent.: *Bank of Montreal v. Hartman*, 12 B. C. R. 375. The word "punctually" in a clause which provides that mortgage moneys shall be called in for three years "if in the meantime every half-yearly payment of interest shall be punctually paid" does not mean "within a reasonable time" but "on the days named": *Leeds and Hanley Theatre of Varieties v. Broadbent*, 67 L. J. Ch. 135; (1898) 1 Ch. 343; 77 L. T. 665; 46 W. R. 230. During a period of ten years a tradesman had delivered to a customer, since deceased, a yearly account, in which it was stated that interest would be charged on all sums due for more than three years. The customer never objected to the charge, and had from time to time made payments on account generally:—Held, that there was an implied agreement to pay interest: *Anglesey (Marquis) In re; Wilmot v. Gardiner*, 70 L. J. Ch. 810; (1901) 2 Ch. 548; 85 L. T. 179; 49 W. R. 708. Interest is not chargeable upon an account stated unless a fixed time for payment was agreed upon or a demand for payment made, or upon an account endorsed shewing that the parties have allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages. *George v. Green* (1907), 18 O. W. R. 247, 787, 13 O. L. R. 189, 10 O. W. R. 292, 140 L. R. 578, affirmed; 42 S. C. R. 219. The mode of computation provided by the contract

being departed from, no certainty remained as to the amount payable or the time of payment, to ascertain which something more than an arithmetical computation was required; and therefore interest could not be allowed under sec. 86, sub-sec. 1, of the Judicature Act, R. S. O. ch. 44. *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99, and *London, Chatham and Dover R. W. Co. v. South-Eastern R. W. Co.*, (1892) 1 Ch. 120, (1893) A. C. 429, followed. *Spartali v. Constantinidi*, 20 W. R. 823, considered. Nor could interest be allowed under sec. 85 as in a case in which it had been usual for a jury to allow interest; for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or by the account taken in the action. *Smart v. Niagara and Detroit R. W. Co.*, 12 U. C. C. P. 404, and *Michie v. Reynolds*, 24 U. C. R. 303, distinguished: *McCullough v. Clemow*, 26 O. R. 467. A note dated 11th January, 1862, payable to and indorsed by one S. H., was for \$3,000, with interest at the rate of two per cent, per month until paid. If a covenant for payment contained in a mortgage deed or the same date given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only, from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid: *St. John v. Rykert*, 10 S. C. R. 278. A mortgage of real estate provided for payment of the principal money secured on or before a fixed date, "with interest thereon at the rate of ten per centum per annum, until such principal money and interest shall be fully paid and satisfied:" Held, affirming 17 A. R. 85, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. *St. John v. Rykert*, 10 S. C. R. 278, followed: *People's Loan and Deposit Co. v. Grant*, 18 S. C. R. 262. Interest *post diem*. Covenant to pay compound interest construed and such interest allowed *post diem*: *Pringle v. Hutson*, 1 O. W. N. 153; *Saskatchewan Land and Homestead Co. v. Leadlay*, 1 O. W. N. 228. *Imperial Trusts Co. v. New York Security and Trust Co.*, 10 O. L. R. 289, distinguished. Interest made payable by a note as part of the debt, not merely damages for detaining it: *Crouse v. Park*, 3 U. C. R. 458; *Howland v. Jennings*, 11 U. C. C. P. 272; *Montgomery v. Bracher*, 11 U. C. C. P. 45; *Young v. Fluke*, 15

U. C. C. P. 360; *Griffin v. Judson*, 12 U. C. C. P. 430. Held, following *Howland v. Jennings*, 11 C. P. 272, and *Montgomery v. Boucher*, 14 C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate may be. The jury having previously allowed them ten per cent. per annum, although they found that defendant had signed the note or instrument agreeing to pay five per cent. a month, a new trial was granted without costs. Held, also, that the amount agreed upon was recoverable under the common count for interest and account stated: *Young v. Fluke*, 15 U. C. C. P. 360. An agent refusing to give an account and pay over balance is chargeable with interest. Costs disallowed to an estate agent of preparing a receipt containing a schedule of lease and securities delivered up to the principal. Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit: *Simonds v. Coster*, 3 N. B. Eq. 329, 1 E. L. R. 544. The Act 63 & 64 Vict. ch. 29 (D.), which provides for the statutory rate of interest being 5 instead of 6 per cent., amending the Interest Act, R. S. C. 1886, ch. 129, contains a proviso that the former Act is not to apply to "liabilities" existing at the time of its passing: Held, that the proper construction of the word "liabilities" is liabilities respecting the rate of interest, and that in a mortgage made in 1884, payable in 1900, bearing interest at 7 per cent., in which there was no provision for the payment of interest after maturity, the damages allowable as interest after maturity were not within the proviso: *Plenderleith v. Parsons*, 14 O. L. R. 619. A chattel mortgage provided for the payment of \$125, the principal money in consecutive monthly instalments of \$5 each, and for payment of \$5 more with each instalment for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate, and waiving also the benefit of the Interest Act, 1897:—Held, that this being an Act passed on grounds of public policy for the benefit of borrowers, its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate: *Dunn v. Malone*, 6 O. L. R. 484. A new agreement between the debtor and creditor extending the time for payment of the debt, and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract and releases the surety. And a provision in such agreement reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and notwithstanding such reservation, the surety is discharged: *Bristol and West of England Land Co. v. Taplow*, 24 O. R. 286. Mode of calculating interest on a mortgage to a saving and loan company, on paying it off before maturity: see *Crone v.*

Crone, 26 Chy. 459. Where a day is named for payment of a note, with interest at a rate specified, the claim for interest after that day is a claim for damages for breach of the contract, not as upon an implied contract, and is in the discretion of the Court or jury: *Faulby v. Newbery*, 37 U. C. R. 514. Although the Court will not interfere with any bargain made by competent parties, since the repeal of the usury laws, for the payment of interest, still if any dispute as to such contract exists, it is the duty of the Court to see that the parties to any agreement for payment of exorbitant interest clearly understood the bargain before effect will be given to it. Where, therefore, on the loan of money it was agreed to pay at the rate of two per cent. a month in advance, and the lender in summing up the account contended that the agreement being that it should be paid in advance was the same as two and one-half per cent. a month, and insisted upon his right to charge that sum, the Court directed the Master to allow at the rate of two per cent., the effect of the interest being payable in advance not having been explained to the borrower: *Teeter v. St. John*, 10 Chy. 85. By sections 57 and 88 of the Bills of Exchange Act, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages, and it is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate: see *McVicar v. McLaughlin*, 16 P. R. 450. Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission where the debt by express contract or by statute bears interest, or where a contract to pay it is implied, but on no other debts will interest be allowed: *Re Langstaff*, 2 Chy. 165. The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par bearing the agreed rate of interest, was held to be within the competence of the Provincial Legislature. A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons having the right to borrow: *Royal Canadian Insurance Company v. Montreal Warehousing Co.*, 3 Legal News 155, 2 Cart. 361. Remarks upon the law relating to pawnbrokers. A pawnbroker under C. S. C. c. 61 may legally charge any rate of interest that may be agreed upon between him and the pledger: *Regina v. Adams*, 8 P. R. 462. No interest is allowable with respect to arrears of an annuity: *Goldsmith v. Goldsmith*, 17 Chy. 213; see *Crone v. Crone*, 27 Chy. 425; *Snarr v. Badesha*, 10 O. R. 151. To save interest by an appropriation of the

purchase money, the money should be separated from the purchaser's general bank account, and notice of the appropriation must be given to the vendor: *Great Western R. W. Co. v. Jones*, 13 Chy. 355. The method usually adopted in making out an account between debtor and creditor upon a loan of money, viz., that of charging first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and deducting all the payments and interest from the whole debt and interest—is not the correct way of arriving at the balance. It is so much in favour of the debtor, that where there has been a long arrear of interest, and payment made on account of the debt, and covering the interest alone, the debtor in a few years, without making any payment in the meantime, will make his creditor his debtor to a very large amount: *McGregor v. Gaulin*, 4 U. C. R. 378. Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced: *Edmonds v. Hamilton Provident and Loan Society*, 18 A. R. 347.

Right of mortgagee to distrain for arrears of interest limited, and right to redeem given: Ont. Stats. 1910, ch. 51, secs. 13-17 inclusive.

COSTS.

The Ontario Judicature Act provides:—

119. Subject to rules of Court, and to the express provisions of any statute, the costs of and incident to all proceedings in the Supreme Court of Judicature, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid.

In a case tried without a jury the Judge cannot deprive the successful party of his costs unless there are materials before him justifying such an exercise of his discretion. The fact that the successful party elects to stand upon his legal rights, and refuses to leave the subject-matter of the litigation to the arbitration of the Judge, does not justify the Judge in making an order depriving such party of his costs: *Civil Service Co-operative Society v. General Steam Navigation Co.*, 72 L. J. K. B. 933; (1903) 2 K. B. 756; 89 L. T. 429; 52 W. R. 181; 9 Asp. M. C. 477; 20 T. L. R. 40.

STAY OF EXECUTION.

The rule as to stay of execution is Con. Rule, 1897, 827.

(1) Unless otherwise ordered by the Court appealed to, or a Stay of Judge thereof, the execution of the judgment or order appealed from shall in the case of a motion or an appeal to a Divisional Court, upon the motion or appeal being set down for argument, and in the

case of an appeal to the Court of Appeal upon the security in Rule 826 mentioned being allowed, be stayed pending the motion or appeal, except in the following cases :

Where partial performance is required execution stayed by delivery into Court.

(a) If the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into the Court appealed from, or placed in the custody of such officer or receiver as that Court or a Judge thereof appoints, or until security has been given to the satisfaction of that Court or Judge, and in such sum as may be directed, that the appellant will obey the order of the Court appealed to ;

Or by executing instrument.

(b) If the judgment appealed from directs the execution of a conveyance or any other instrument, execution shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from to abide the judgment of the Court appealed to ;

Or by the giving of special security not to commit waste.

(c) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been given to the satisfaction of the Court appealed from, and in such sum as that Court or a Judge thereof directs ; that during the possession of the property by the appellant he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal,

Where injunction or mandamus ordered

(d) If the judgment appealed from awards a mandamus or an injunction, execution shall not be stayed except upon application to the Court appealed to, or a Judge thereof, and upon such terms as may seem just.

(2) Upon special application the Court appealed to or a Judge thereof may order that execution shall not be stayed in whole or in part except upon such terms as may seem just, including the giving of security for any sum directed by the judgment or order appealed from, to be paid either as a debt or for damages or costs or for any less sum, or may order that execution be stayed although security has not been given under Rule 826, and although the preceding provisions of this Rule have not been complied with upon such terms as may seem just.

PART II.

EVIDENCE IN PARTICULAR CASES.

TITLE I.

ACTIONS ON SIMPLE CONTRACTS.

ACTION ON SALE OF REAL PROPERTY.

This action may be brought either by vendor against vendee, or by vendee against vendor. It includes claims for specific performance of contracts of sale, and is often met by a counterclaim for rescission of the alleged contract. It frequently ends in a reference as to damage sustained by aggrieved party.

See *post* Part III. as to defences available in actions generally. In this Part a few special observations only are made with regard to defences peculiarly applicable to the action under consideration.*

VENDOR AGAINST VENDEE.

In an action on sale of real property **by vendor against vendee on purchaser's default, the plaintiff must prove:—**

1. The contract.

2. The performance by himself of all conditions precedent.

3. The default.

As to proof of the contract, the provisions of the Statute of Frauds (29 Car. II., c. 2, s. 4), must be borne in mind.

The Statute of Frauds, 29 Car. 2, c. 3, s. 4, provides as follows:

No action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

No action upon any agreement, or contract for sale of lands, etc., unless agreement, etc., be in writing and signed

A defence under this statute must now be pleaded specially: *Greenizen v. Burns*, 13 A. R. 481. When it is so pleaded it will be necessary to prove a contract in writing: See *Cleaver v. North of Scotland M. Co.*, 27 Chy. 508.

* See for this action Frauds, Statute of, *post*, page 531.

The note or memorandum required by the statute must be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. Subject, terms, and names of the parties must appear: *Williams v. Lake*, 2 E. & E. 349. An acceptance in writing by the owner of land of a written offer therefor addressed to him, but unsigned by any purchaser, and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer: *McIntosh v. Moynihan*, 18 A. R. 237. Sheriff as assignee for creditors signed a memorandum of sale; held, not an agent for both parties: *McIntyre v. Faubert*, 26 O. R. 427. Selling under an execution he is agent for both: *Flintoft v. Elmore*, 18 U. C. C. P. 274. As to auctioneer, is agent: see *Reg. v. Rawson*, 22 O. R. at p. 471. A memorandum is "signed" within the Statute of Frauds, if only the surname of the purchaser is written on it by the auctioneer. Merely formal terms of sale will be implied by law. An auctioneer, authorized to sell, has no authority to rescind the sale: *Farquhar v. Billman*, 40 N. S. R. 289.

Certain lands were sold to a purchaser by private treaty, through an auctioneer authorized to act as agent for the vendor, subject to conditions originally prepared for a sale by public auction, which had proved abortive. The purchaser signed the memorandum in writing attached thereto, acknowledging that he had purchased from the vendor the premises mentioned in the annexed particulars for £800, subject to the conditions of sale thereunder annexed, and that he had paid the deposit and that he agreed to pay the balance on or before the date mentioned in the conditions of sale. The memorandum was also signed by the auctioneer as "witness." The vendor refused to complete: *Held*, that the vendor was bound by the signature of the auctioneers, although merely purporting to sign as "witness," he having been duly authorized to sell by the vendor: *Wallace v. Roe* (1903), 1 Ir. R. 32.

An agreement to enter into an agreement for the sale of land held no binding contract: *Anglo-Canadian Land Co. v. Gordon* (Man.), 10 W. L. R. 517.

This seems to be a case in which I should follow the principles applied in *Laford v. Provand*, L. R. 2 P. C. 135. The parties to the agreement and the consideration are certain. The property in the minds of the parties and the subject matter of the contract were capable of being made certain: *Davis v. Shaw*, 1 O. W. N. 358.

Difference between option and substantive agreement discussed: *Jones v. Norris*, 12 W. L. R. 651.

The note or memorandum of an agreement for the sale of real estate must contain the names of the contracting parties, or such a

description of them, that there cannot be a fair dispute as to their identity. The term "vender" is not in itself a sufficient description of one of the contracting parties: *Potter v. Dagfield*, L. R. 18 Eq. 4; *Williams v. Jordon*, 6 Ch. D. 517; *White v. Tomalin*, 19 O. R. 513. In the present case the purchaser was neither named nor described in the agreement. As the agreement did not comply with the requirements of the Statute of Frauds, the plaintiff was not entitled to recover: *Maber v. Penskalski*, 15 Man. L. R. 236.

The writing of the purchaser's name near the beginning of a written agreement of sale, prepared by a solicitor, under the instructions of the purchaser's duly authorized agent, may be a sufficient signature by the purchaser's agent, within the meaning of the statute, although the agreement is signed by the vendor only: *Mellivide v. Mills*, 16 Man. L. R. 276.

An offer to purchase land written on paper containing the printed name and address of the vendor, but not signed by him, is not a sufficient memorandum of the contract to satisfy the Statute of Frauds, unless it be written at his dictation: *Schneider v. Norris*, 2 M. & S. 286, and *Evans v. Hoare* (1892), 1 Q. B. 593, distinguished: *Hucklesby v. Hook*, 82 L. T. 117. When two parties enter into a formal written agreement for the sale and purchase of land containing all the particulars necessary to make it binding under the Statute of Frauds, and all the terms they intended to embody in it, and there is not suggestion of accident, fraud or mistake in the preparation or execution of it, specific performance of it may be decreed, notwithstanding that the parties at the same time verbally agreed upon a number of collateral agreements or subsidiary conditions for conveniently carrying out the written agreement, and notwithstanding the Statute of Frauds: *Anderson v. Douglas*, 18 Man. L. R. 254; 8 W. L. R. 520; 9 W. L. R. 378. Documents left in escrow could not be used as evidence to a verbal agreement sufficient to take it out of the statute: *Vandervoort v. Hall*, 18 Man. L. R. 682.

Instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay the commission on the purchase price accepted, are an authority to the agent to make a binding contract, including an authority to sign a contract for sale: *Chadburn v. Moore*, 61 L. J. Ch. 674, and *Hamer v. Sharp*, 44 L. J. Ch. 53; L. R. 19 Eq. 108, distinguished. *Rosenbaum v. Belson*, 69 L. J. Ch. 569; (1900), 2 Ch. 267; 82 L. T. 658; 48 W. R. 522. In an action by a vendor against a purchaser on an executory contract for the purchase of land, where the plaintiff is not merely seeking a declaration that he has effectively exercised a legally binding express provision for rescission or a legally binding express provision or the implied provision for resale, he may claim, (1) damages, (2) specific performance, (3) rescission, (4) sale to

realize vendor's lien. In order to succeed the vendor must shew a good title. Cases on forfeiture, cancellation and vendor's remedies discussed, and *Great West Lumber Co. v. Wilkins*, 7 W. L. R. 166, 1 Alta. L. R. 155, applied: *Merriam v. Paisch*, 8 W. L. R. 240; 1 Alta. L. R. 262. The contract is an executed one, and has been adopted by the plaintiff. In the absence of actual fraud the Court will not set aside the transaction: *Bell v. Macklem*, 15 S. C. R. 581; *Brownlie v. Campbell*, 5 App. Cas. 925; *Petrie v. Guelph Lumber Co.*, 11 S. C. R. 450.

Independently of any express provision a right of resale exists in favour of the vendor under an agreement of sale upon default by purchaser: *Noble v. Edwards*, 5 Ch. D. 378.

But the vendor must give a perfectly distinct notice of his intention to resell and allow the purchaser a reasonable time within which to remedy his default: *Moodie v. Young*, 8 W. L. R. 310; 1 Alta. L. R. 337.

A full statement of the proper procedure in cases of default where purchase money is payable by instalments and default is made will be found in *Canadian Pacific R. W. Co. v. Meadows*, 8 W. L. R. 806; 1 Alta. L. R. 844.

Powers of rescission must be strictly followed and their exercise subjected to rigorous scrutiny in a Court of Equity, just as in the case of notices under powers of sale in mortgages: *In re Dagenham and Cornwall v. Henson*, *ut sup.*, followed.

The plaintiff's remedy would be to commence an action in the nature of specific performance to have the contract cancelled by decree of the Court upon default after a time to be fixed by the Court: *Hudson's Bay Co. v. Macdonald*, 4 Man. L. R. 327, and *Lysaght v. Edwards*, 2 Ch. D. 509, followed: *Canadian Fairbanks Co. v. Johnston*, 18 Man. L. R. 509; 10 W. L. R. 571.

Forfeiture of substantial payments on account of purchase money paid under agreement for purchase relieved against as being a penalty against which Court would relieve: *Hall v. Turnbull*, 10 W. L. R. 536; *Banton v. March*, 12 W. L. R. 602.

If the purchaser has not merely delayed but abandoned or repudiated the contract all his rights in it are gone, and the vendor may deal with the property and payments on account, as if the contract had never been made: *Cornwall v. Henson* (1909), 2 Ch. 298, and *Stringer v. Oliver*, 6 W. L. R. 519, discussed: *Great West Lumber Co. v. Wilkins*, 7 W. L. R. 166; 1 Alta. L. R. 155. That where a party to a contract, of which he is entitled to demand specific performance has been guilty of undue delay in performing his part of such contract, the Court will treat the contract as abandoned and refuse specific performance: *Battell v. Hudson's Bay Co.*, 8 W. L. R. 760; 1 Sask. L. R. 169. A definite oral bargain (good evidence for

the Statute of Frauds) for the sale by the plaintiff to the defendant of an ascertainable and definite parcel of land, is a sufficient consideration for a cheque drawn by the defendant upon the bank in favour of the plaintiff for a part of the purchase money. *Keen v. Harper*, 15 O. L. R. 582, 11 O. W. R. That there was a completed contract between the parties enforceable by the plaintiffs, notwithstanding the absence of the more formal agreement contemplated. The principle laid down in *Chalcock v. Marchioness of W.*, 4 D. G. J. & S. 648, and *Rossiter v. Miller*, 3 App. Cas. 1142, adopted: *Munroe v. Heubach*, 18 Man. L. R. 450; 10 W. L. R. 196. The exception to the ordinary rule of law rendering a party unable to complete a contract liable to damages, in force in the English Courts in cases of contracts for sale of land, exempting a vendor from liability in damages in the event of inability to complete title prevailing in England, did not apply here where the system of land titles was simple and certain; and therefore the ordinary rules applicable to contracts applied and the defendants were therefore liable in damages: *Wynall v. Drinkle*, 1 Sask. L. R. 402; 8 W. L. R. 937. In case of a transfer from the purchaser from the owner of the fee under an agreement for sale, that, although an action could not be brought by the transferer against the vendor for specific performance where the purchase money and interest had been paid, the transferees can, in an action by them as equitable assignees against the vendor and purchaser, obtain a judgment declaring the purchaser from the owners in fee simple trustees for the transferees the plaintiffs: *Saupey-Massey Co. v. Bennett*, 12 W. L. R. 249.

A conditional promise to purchase land may be enforced: *Sylvester v. Murray*, 26 O. R. 595, 765. Effect of payment of purchase money to a person not entitled to receive it discussed: *McClellan v. McCaughan*, 23 O. R. 679. As to names: see *Wilmot v. Stalker*, 2 O. R. 78; *Cameron v. Spiking*, 25 Chy. 116. As to terms: see *Devine v. Griffin*, 4 Chy. 603.

It is not necessary that the names or terms should appear in any single paper. The contract may be collected from several connected papers: *Rochleau v. Bidwell*, Dra. 345; *Kennedy v. Oldham*, 15 O. R. 433. The connection ought to appear on the papers, and not by intrinsic oral evidence only: *McClung v. McCracken*, 3 O. R. 596. Where a Court has to find a contract in a correspondence, and not in one particular note, memorandum formally signed, the whole of what has passed between the parties must be taken into consideration: *Hussey v. Harne-Payne*, 4 App. Cas. 311, followed.

Where an agreement by letters is made "subject to" the approval of a formal contract, there is no concluded contract until such formal contract has been approved. Secus, where the stipulation is not conditional, but merely supplemental: *Winn v. Bull*, 47

L. J. Ch. 139; 7 Ch. D. 20, followed. *Bromet v. Neville*, 53 S. J. 321.

Contract by correspondence—rule of construction that grant to be read most strongly against grantor. Quære, if maxim is still law: *Taylor v. Corporation of St. Helen's*, 6 Ch. D. 270. Not applicable to correspondence: *Watson v. Jamieson*, 12 W. L. R. 668.

Where an agreement contains the names of two contracting parties, the subject matter of the contract and the promise, it is binding on the party signing it, although not signed by the other party: *Bank of British North America v. Simpson*, 24 U. C. C. P. 354. In order to convert a proposal into a promise the acceptance must be absolute and unqualified, and should be prompt and immediately given: *Fulton Bros. v. Upper Canada Furniture Co.*, 9 A. R. 211. When a proposal is made in writing by one party and accepted by the other, either verbally or by acting upon it, the contract is a written one: *Ellis v. Abell*, 10 A. R. 226.

An agreement good under the Statute of Frauds can, it seems, be wholly rescinded, but cannot be varied by a subsequent oral agreement: *Goss v. Lord Nugent*, 5 B. & A. 58. The person authorized by the party to sign need not be authorized in writing. As to telegrams: see *Godwin v. Francis*, L. J. 5 C. P. 295; *Henkel v. Pape*, L. J. 6 Exch. 7; *McFarren v. Johnson*, 6 O. R. 161; *McCarthy v. Cooper*, 12 A. R. 284.

Where there has been a part performance of a contract falling within the provisions of the Statute of Frauds (s. 4), although there is no written note or memorandum of the agreement, as required by the section, specific performance will be ordered: *Alderson v. Maddison*, 8 App. Cas. 420; *Campbell v. McKerricher*, 6 O. R. 85; *Coates v. Coates*, 14 O. R. 195. The Courts will enforce the contract where the absence of a written memorandum is caused by fraud.

In an action to enforce specific performance of an alleged contract for the sale of land the only written memorandum of the contract was a receipt for \$100 "in part payment of lot 16," etc., describing it, mentioning also the balance of the price and the purchaser's name, but not disclosing the name of the vendor, and signed "P. W. Black, agent:" Held, that this was not sufficient to satisfy the Statute of Frauds, parol evidence to supply the name of the vendor not being admissible: Semble, also, on the evidence, that the agent had no authority to bind the vendor by executing a contract, and that, on account of the inadequacy of the price, the Court would be slow to enforce specific performance: *Bradley v. Elliott*, 11 O. L. R. 398, 7 O. W. R. 137. A written agreement to sell "lots 16, 17, block 196, district lots . . ." must be taken to refer to land belonging to the vendor, and is a sufficient description within the Statute of Frauds to make extrinsic evidence admissible

for the purpose of identifying the land and shewing the subject matter of the negotiations between the parties: *Plant v. Bourne* (1897), 2 Ch. 281, followed: *Lewis and Sills v. Hughes*, 13 B. C. R. 228.

The description was "No. 22 Ann Street." The correct number was 24. There was no number 22; and the defendant owned no other property in Ann Street: Held, sufficient: see *Cowen v. Truefit* (1899), 2 Ch. 309, 311; *Foster v. Anderson*, 16 O. L. R. 565.

The plaintiff must next prove *performance of conditions precedent*. Where a party offers an estate for sale without qualification it amounts to an assertion that he is seized of an absolute estate in fee simple, and he undertakes, in the absence of express stipulation, to convey that estate. Where, therefore, there is a mere agreement by A. to sell and by B. to purchase, with no conditions, it is B.'s right to have a good title made out for him by A., and it is his right to have that title sifted for him to the bottom. In cases of that kind the vendor must produce an abstract of title, and the vendee is entitled to make objections to or requisitions thereon, and until a full and perfect abstract is finished the vendee may object or require further information. If, on the abstract, it is absolutely out of the power of the vendor to make a good title the purchaser may at once rescind. Parties may by their conditions waive their right: see *Nason v. Armstrong*, 21 A. R. at page 191. The implied obligation to pay off the encumbrance which in the case of a conveyance of land to a person *sui juris* is imposed by a Court of Equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property: *McMichael v. Wilkie*, 10 A. R. 464. Frontage rates are encumbrances which vendors must remove: *Re Graydon v. Hammill*, 20 O. R. 199; *Cumberland v. Kearns*, 17 A. R. 281. Taxes due upon land at the time of sale are an incumbrance within the covenant for quiet enjoyment; but the plaintiff can recover only the arrears due at the date of the conveyance: *Haynes v. Smith*, 11 U. C. R. 57.

If the vendor's title be put in issue, he must prove it. This is generally done on reference. The Court refers the question of title to the Master to report upon, reserving costs until he shall have made his report. See *Vendors and Purchasers' Act* (K. S. O., 1897, c. 112), (page ante), and the *Act respecting the law and transfer of property* (R. S. O., 1897, c. 100), and also the provisions of the *Registry Act* as to the effect of registering. See *post*, under Title Defence of Purchase without Notice of Registry Title. These enactments have rendered evidence of title more simple. To entitle a purchaser to disavow a contract on the ground that the title to the land is not in the vendor he must repudiate promptly on discovering that fact, and if he subsequently thereto treat the contract as binding, he will be held to his election and be remitted to the rights of an ordinary purchaser, including that of terminating unreasonable

delay by a sufficient notice: *Robinson v. Harris*, 21 O. R. 43. Delays caused by the state of the title do not, unless there has been in addition some gross negligence or misconduct, amount to wilful default: *Stevenson v. Davis*, 23 S. C. R. 632.

An averment of *readiness to convey* is negated by proof of a defective title, for it negatives ability to convey: *De Medina v. Norman*, 9 M. & W. 820. Accidental deterioration after the date of the contract is a loss which must fall on the vendee: *Robertson v. Skelton*, 12 Beav. 260. See also *Stevenson v. Bain*, 8 P. R. 258. The Court has cognizance of all the rights of all the parties arising out of an agreement; and if either is entitled to damages the Court ought to ascertain them: *Casey v. Hanlon*, 22 Chy. 445. See also *Ledyard v. McLean*, 10 Chy. 139; *Gough v. Bench*, 6 O. R. 699. As to costs, the ordinary rule in a vendor's suit is that the costs are given against him up to the time when he has first shewn a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result: *Laird v. Paton*, 7 O. R. 137. The plaintiff is entitled to his costs if he offered a possessory title before action, even if he did not prove it until after: *Dame v. Slater*, 21 O. R. 375.

Costs of reasonable defence by purchaser of action against him by sub-vendee: *Agius v. G. W. Colliery Co.* (1891), 1 Q. B. 413.

If a defendant is able to make a good title before the day fixed for the completion of the contract, the contract can be enforced: *In re Bryant and Barringham's Contract*, 44 Ch. D. 223; *Maybery v. Williams*, 12 W. L. R. 692.

An equitable owner with a right to get in the absolute title is not entitled to rescind contract on that ground: *Shaw v. Foster*, L. R. 5 H. L. 350; *Egmont v. Smith*, 6 Ch. D. 476.

In Ontario the Court may allow money to be paid into Court to secure the purchaser against an outstanding incumbrance, as in *Cameron v. Carter*, 9 O. R. 426, that course being permissible under R. S. O. c. 119, s. 15. In Manitoba no similar statutory provision: *Martt v. Wishard-Langan Co.*, 18 Man. L. R. 376, 9 W. L. R. 519.

When a day is fixed for completion, unless the vendor make out a good title by that day the purchaser was at law entitled to rescind the contract; but not so in equity, which now prevails: *Stevenson v. Davis*, 23 S. C. R. 629, 631. That when a contract for sale of land the parties expressly agree that time is to be of the essence of the contract, and that upon default the vendor may cancel the contract by notice to the purchaser and in pursuance of such power the vendor cancels the contract, the Court has no jurisdiction to relieve against such cancellation, which is purely a matter of contract between the parties: Held, also, that failure to fill in a blank in a printed agreement has not

the effect of rendering the clause in which such blank is found of no effect: Held, further, that a notice of cancellation which is substantially in the terms of the covenant authorising it is sufficient: *Steele v. McCarthy*, 1 Sask. L. R. 317, 7 W. L. R. 902.

The equitable principle does not apply where the property fluctuates in value from day to day, as in the case of a life annuity: *Withy v. Cottle*, Turn. & R. 78. See also *Sanderson v. Burdett*, 16 Chy. 119; or of a reversion: *Patrick v. Milner*, 2 C. P. D. 342; nor where property is bought for the purpose of residence: *Tilley v. Thomas*, L. J. 3 Chy. 61. See also *Crossfield v. Gould*, 9 A. R. 218. This presumption is rebutted by the parties treating the contract as still subsisting after the time fixed for completion: *Robinson v. Harris*, 21 O. R. 42. Time may be of the essence of a contract, even without any express stipulation, if it appears that such was the intention: *Oldfield v. Dickson*, 18 O. R. 188. On a sale of timber limits: see *Crossfield v. Gould*, 9 A. R. 218.

Contract included clauses: "There shall be of the essence of this offer," "Deed to be prepared at the expense of the vendor and mortgage at my expense (i.e., of purchaser)." Held, time of essence of all terms of contract. The duty of purchaser to tender purchase money did not arrive until vendor prepared deed and tendered for approval. Not having done so vendor could not claim laches of purchaser: *Poster v. Anderson*, 16 O. L. R. 565.

A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance: *Smith v. Tennant*, 20 O. R. 180. If the parties have, before suit, carried out any of the terms of a contract, such executed portions will not be disturbed: *Peck v. Powell*, 11 S. C. R. 494.

As to interest payable by purchaser: see *Stevenson v. Davis*, 23 S. C. R. 629; *Hayes v. Flimley*, 22 S. C. R. 623.

In a suit for specific performance, even where a purchaser has taken possession of the premises, as a general rule he is only liable for arrears of interest for the period of six years prior to the filing of the bill. Where the purchaser dies, the rights of no incumbrancer intervening, the vendor is entitled to a charge on the land in the hands of the heirs for a period beyond the six years, in order to prevent circuity of action: *Airry v. Mitchell*, 21 Chy. 510, 229.

DEFENCE.

Denial of contract. The Consolidated Rules require the defendant specifically to allege in his defence that he relies on the Statute of Frauds, or on fraud or misdescription.

When two persons have agreed that a contract which has been the subject of an interview between them shall be reduced to writing, there is a presumption that they have made the reducing to writing a substantial condition of the formation of the contract, and the burden of proof is on the one who asserts the contrary: *Dorion v. Bedard*, Q. R. 27 S. C. 193.

Although a part of a contract for the sale and purchase of land may not be binding under the Statute of Frauds, another part of it, if in the alternative and distinct from the agreement to purchase—e.g., that either party will pay to the other a named sum if he does not fulfil his agreement to sell or purchase—may, on his refusal to do so, be enforced against the party refusing: *The Canadian Bank of Commerce v. Perram*, 31 O. R. 116, followed: *Mercier v. Campbell*, 14 O. L. R. 639.

The position of a defendant resisting a claim is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the statute: *Lawrence v. Errington*, 21 Chy. 261. Where more than one person is employed by the vendor to bid at a sale by auction, this will be deemed a fraud. See R. S. O. 1897, c. 100.

Other special defences are: **Imperfection of title, defects in subject-matter of contract.**

A purchaser of land may, on discovering that the vendor has no title, repudiate on that ground; but attempted repudiation on another ground does not keep this right alive, if the vendor at the proper time can make a good title: *Paisley v. Wills*, 18 A. R. 210. A party who enters into a contract for the purchase of land knowing that the person with whom he is contracting does not own the land in question, and that the contract does not bind the estate, but only the person of the contracting party, cannot set up that the vendor is not the owner so as to repudiate the contract on that ground: *St Denis v. Higgins*, 24 O. R. 230. Where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation: *Moorhouse v. Hewish*, 22 A. R. 172. In an agreement for exchange of land it was stated that the property was subject to a mortgage encumbrance of \$750, bearing interest at the rate of seven per cent. per annum. The property was one of four houses and lots mortgaged for \$3,000, with interest at ten per cent., payable half yearly, to be reduced if punctually paid to seven per cent., with an agreement to release each house on payment of \$750. Held, not an accurate statement of the mortgage encumbrance:

Bank v. Nelson, 21 O. R. 152.

Misrepresentation without fraud or deceit no ground for damages: *Cross v. Douglas*, 12 W. L. R. 276; *Redgrave v. Hurd*, 29 Ch. D. 1 at p. 12.

Since the Judicature Act there seems to be no substantial distinction between a vendor's action to recover his purchase money, and a vendor's action for specific performance where the purchase money sought to be recovered is payable, as in *McDonald v. Murray* (11 A. R. 101), contemporaneously with the delivery of the conveyance. But where the action is brought for the recovery of instalments payable by the terms of the contract before the time for completion has arrived, the vendor appears entitled to judgment for them unless some equitable ground of relief is shewn, as, for instance, the existence of incumbrances or some defect in the title. Where the only objection is the existence of incumbrances to an amount not exceeding the purchase money, the overdue instalments should be paid into Court, and the same rule should in general govern where there are defects in the title and the defendant is in possession, unless he will go out of possession: *Armstrong v. Auger*, 21 O. R. 103.

When the price is payable by instalments the purchaser of land has a right to have a reference as to title, and to have title manifested before he makes a single payment: *Cameron v. Carter*, 9 O. R. 426. Held, that the covenant for payment of the instalments, and the covenant against incumbrances were independent; and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and the time for completion of the contract not having arrived, to pay into Court so much of his purchase money as might be necessary to protect him against the incumbrances: *McDonald v. Murray*, 11 A. R. 101, and *Tisdale v. Dallas*, 11 C. P. 238, distinguished: *Armstrong v. Auger*, 21 O. R. 98. A stipulation in a contract for the sale of land, the price whereof is payable by instalments, that upon default by the purchaser in making any one of the payments within sixty days after it falls due, the contract of sale shall become void and the vendor shall have the right to retain all that he has already received as liquidated damages, is a binding contract for the benefit of the vendor, which the latter only can invoke upon default. The purchaser cannot take advantage of his own default in the fulfilment of a part of his engagement in order to free himself from the rest: *Peloquin v. Cohen*, Q. R. 28 S. C. 193. A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract. In an action to recover instalments under the contract: Held, that local improvement rates imposed by municipal by-laws, after the work having been done before the date of the contract, were incumbrances to be dis-

charged by the vendor; but rates imposed and work done after the contract were not so. *Re Graydon and Hammil*, 20 O. R. 199, followed. *Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal*, 16 S. C. R. 400, distinguished. A vendor of land—under an agreement providing for payment of the purchase money in annual instalments with interest, and that the purchaser so soon as he had paid three-fifths should be entitled to a conveyance, upon executing a mortgage back for the balance—is entitled to sue the purchaser for the payments falling due prior to three-fifths being paid without proving that he has tendered a conveyance: *H. H. Vivian & Co., Ltd. v. Clergue*, 41 S. C. R. 607. See also *Labelle v. O'Connor*, 15 O. L. R. 519. *Barclay v. Messenger*, (1874) 22 W. R. 522, 43 L. J. Ch. 449, followed. *In re Dagenham (Thames) Dock Co.* (1873) L. R. 8 Ch. 1022, and *Cornwall v. Henson* (1899) 2 Ch. 710, (1900) 2 Ch. 298, distinguished.

Where a vendor files his bill for specific performance against a purchaser on a contract partly performed, the evidence of the contract must be clear and unimistakeable, and the acts done must be such as cannot be referred to any other than the contract as alleged or done with any other intention than in part performance of such contract: *Sexton v. Shell*, 6 L. J. 94.

Possession is part performance of a contract for the sale and purchase of land both by and against a stranger and the owner. On negotiations for the purchase of land the agent of the plaintiff, vendor, told the defendant purchaser that the lot was his. The defendant went on and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase:—Held, that what he had done constituted such a taking of possession as to constitute part performance and that the plaintiff was entitled to the usual judgment for specific performance: *Bodwell v. McNiven*, 5 O. L. R. 332.

The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion to be governed as far as possible by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shown to the conduct of the persons seeking relief: *Harris v. Robinson*, 21 S. C. R. 390.

Where a contract is made by one partner for the sale of partnership lands, to which the other partner refuses to consent, the purchaser cannot insist upon taking the share in lands of the contracting partner with a proportionate abatement in the price: *Crain v. Kapple*, 2 A. R. 291.

In the absence of agreement or circumstances operating to the contrary a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is not limited to

cases of conveyance for a money consideration. Where, therefore, upon the partition of a piece of land held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant: *Ward v. Wilbur*, 25 A. R. 262.

In this province on a sale of land, unless it is otherwise provided in the agreement, it is the duty of the vendor to prepare and execute the conveyance at his own expense, and a purchaser may maintain his action for breach of the contract without tendering a conveyance to the vendor for execution. *Sweeney v. Godard*, 4 Allen (N.B.) 30, followed: *Dysart v. Drummond*, 7 M. L. R. 68 (Man.). A contract sealed and delivered by one party, which is subject to the approval of the other party, cannot be revoked by the former before the latter has had a reasonable time within which to signify this assent. Nominal damages only allowed against the defaulting party under the circumstances set out in the report: *Waterous Engine Works Co. v. Pratt*, 30 O. R. 538.

VENDEE AGAINST VENDOR.

If vendor refuse or is unable to complete his contract, purchaser may sue for damages; or if purchaser has paid a deposit or part of purchase money, and he has not taken possession, he may sue to recover his money. So, if fraud is practised, he may rescind and sue for deposit.

In a special action on the contract by the purchaser, he must prove (1) the contract, (2) the performance of conditions precedent.

To enable purchaser to maintain an action for money had and received in order to recover the deposit the contract must be disaffirmed *ab initio* upon grounds entitling him to such disaffirmance.

When plaintiff seeks to recover the deposit he must prove payment to defendant or defendant's agent.

Where the contract is oral he can recover deposit only, but no damages. In other cases he may get the deposit with interest and expense of investigating title, etc.: *Farquhar v. Farley*, 7 Taunton 592; *Wrayton v. Naylor*, 24 S. C. R. 295.

The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him, and always ready to carry out the contract on his part within a reasonable time, even though time was not of its essence; nor when he has declared his inability to perform his share of the contract.

The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements: *Wallace v. Hesselin*, 29 S. C. R. 171.

If the purchaser has taken possession of the premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises. His remedy is then on the contract itself: *Blackburn v. Smith*, 2, Ex. 783.

The benefit of a provision in a contract for the sale of land, that if any objection or requisition be made by the purchaser which the vendor shall be unable or unwilling to comply with, the vendor shall be at liberty, by notice in writing, to rescind the agreement, is lost if the vendor's solicitor attempts to answer the requisitions and enters into negotiations with the purchaser's solicitor in regard to them. A vendor should either cancel the contract when he first reads the requisitions, or when embarking on the attempt to comply with them, or to remove the objections, should reserve to himself the benefit of the right to rescind further on during the negotiations: *Crabbe v. Little*, *Moses v. Little*, 14 O. L. R. 631.

Where, on a sale of land, there has been a conveyance perfected, and the seller having no title the purchaser is evicted, unless fraudulent misstatement or concealment is made out, there can be no action except on the covenants, and where there are no covenants or none that will extend to the cause of action, there can be no action against the vendor: *Thomas v. Crooks*, 11 U. C. R. 579. The purchaser is not in general entitled to recover "fancy" compensation where the vendor is, without fraud, incapable of making a title: *Bain v. Fothergill*, L. R. 7 H. L. 158. Where, however, the sale does not go off for want of title, but by reason of the refusal of the vendor to take the necessary steps to give possession, the plaintiff can recover damages for the loss of the bargain, the measure of damages being the difference between the contract price and the market price at the time of the breach. (S.C.). Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them, then, though it be called liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable: *Ex parte Capper*, 4 Ch. D. 724. Loss of profit occasioned by, and the expenses which a purchaser of lands has been put to, on a resale by him, unknown to his vendor before such purchaser has entered into a binding contract for purchase, are not damages naturally flowing from the breach of the latter agreement, and cannot be recovered by him against his vendor. If recoverable at all, the true measure would be the increased value of the land at the time of the breach over the purchase money: *Loney v.*

Oliver, 21 O. R. 89; withdrawal of offer: *Larkin v. Gardiner*, 27 O. R. 124. An intending purchaser of land, who has been guilty of laches, bad faith, and default for a considerable time in payment of the cash stipulated for, disentitles himself to the exercise of the judicial discretion to grant specific performance in his favour: *Maber v. Penskalski*, 15 Man. L. R. 236. To entitle a party to a contract to a decree for specific performance he must have been prompt himself in performance of the obligations devolving upon him, and always ready to carry out the contract within a reasonable time, even although time might not have been of the essence of the agreement. Specific performance will not be decreed when the party asking performance has declared his inability to carry out the agreement on his part. A purchaser of land who takes possession of the property and exercises acts of ownership by making repairs and improvements will be held to have waived any objections to the title. Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution for the purpose of carrying out the purchase. Judgment appealed from (29 N. S. Rep. 424) affirmed: *Wallace v. Hesslein*, 29 S. C. R. 171. When lands are bargained and sold, the measure of damages for non-fulfilment of the agreement is the price for which the lands were so sold: *Lynch v. Ring*, 2 Thom. 418 (N.S.). While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it postponing the period for performance, and the original consideration will be read as imported into such new agreement and will support it: *Hurlburt v. Thomas*, 3 U. C. R. 258; *O'Donnell v. Hugill*, 11 U. C. R. 441. If the plaintiff part with anything that is of value to himself, though it may be of no legal value in defendant's promise, that forms a valid consideration for the promise: *Bradford v. O'Brien*, 6 U. C. R. 417.

A misrepresentation by the vendor's agent without the knowledge of the vendor as to the locality of the land sold, although innocently made, will, if relied on by the purchaser, be sufficient to entitle him to rescind the contract although he had the means of knowledge of the true location before he entered into the agreement. *Raulins v. Wickham*, 3 De G. & J. 317, and *Derry v. Peck*, 14 App. Cas. 327 followed. But, when the purchaser failed to complain of the misrepresentation within a reasonable time after he became aware of the true location of the property, and promised the vendor to pay the next instalment of the purchase money due under the agreement after it was overdue, saying that he was then a little short of money, it should be held that he had elected to affirm the contract and had lost the right to rescind it. *Clough v. London and North Western R. W. Co.*, 1 L. R. 7 Ex. 24, followed. *Wolfe v. McArthur*, 7 W. L. R. 124, 18 Man. L. R. 30. Misrepresentations not amounting to warranty. *DeLasalle v. Guildford*, (1901) 2 K. P. 221, followed; *Mey*

v. Simpson, (1908) 17 Man. L. R. 597, affirmed, (1908) 42 S. C. R. 230. Misrepresentation—abuse of fiduciary relationship. *Fellowes v. Lord Gwydyr*, 1 Sim. 63, discussed and distinguished: *Henderson v. Thompson*, 41 S. C. R. 445. As there had not been a full and fair disclosure of material circumstances (leaving the vendor in ignorance of the position of the purchaser, he being the representative of the vendor's agent) sale could not be supported: *McGuire v. Graham*, 16 O. R. 431, 11 O. W. R. 999.

ACTION FOR USE AND OCCUPATION.

Founded on 11 Geo. II., c. 19, s. 14.* This is a form of action on the case, based on the relationship of landlord and tenant. Action of *debt* for rent on a contract for use and occupation lies at common law, and not on this statute.

The plaintiff proving a legal title to the premises, and a mere naked possession by the defendant, is entitled to a *verdict*. He need not prove an attornment or contract between himself and defendant: *Price v. Lloyd*, 3 U. C. R. 120.

In *Glendinning v. Turner*, 9 O. R. 34, a defendant counter-claimed for use and occupation against a plaintiff. He was held not entitled on the evidence.

If defendant has come in under plaintiff, or has acknowledged title by payment of rent or otherwise, he cannot dispute plaintiff's title, but he may show it has expired.

In general, title of plaintiff is established by the production of writing or agreement, which is proved in the usual manner; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him or submitted to a distress. Notice to produce receipt for rent, or the notice of distress, should in such cases be given by the plaintiff. If it appear from the plaintiff's witnesses that defendant holds under a written agreement not produced, plaintiff will not be allowed to give oral

* Now repealed S. L. R. 1902. It was as follows:—It shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants in an action on the case for the use and occupation of what was so held and enjoyed; and if, on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not, therefore, be non-suited, but may make use thereof as evidence of the quantum of damages to be recovered.

evidence of the holding: but if plaintiff has made out a *prima facie* case, and the defendant seeks to show that he holds under a written agreement, he must produce the instrument, or his objection is untenable.

There must be an occupation or holding, actual or constructive; therefore a tenant who has agreed to take premises, but has not entered, is not liable to an action for use and occupation.

It is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises, and the continuance of the occupation will be presumed until the contrary appears.

Although the premises are burned down and remain unoccupied, unless it be agreed that the liability shall cease after the fire, the tenant still continues liable in this action for the rent subsequently accruing, for the premises continue to be "held" by the defendant: *Baker v. Holtzapfel*, 4 Taunt. 45. The fact of the premises having been insured, and the landlord having received the insurance money and not applied it to reinstating the premises, affords no equitable defence to the action: *Lofft v. Dennis*, 28 L. J. Q. B. 168. If, after the determination of a lease, the tenant holds over and pays rent, such holding over and payment of rent are conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time that he occupies the premises: *Bishop v. Howard*, 2 P. & C. 100.

It is not necessary that there should be an express contract creating the relation of landlord and tenant between the parties; the relation may be implied.

Thus where the defendant has entered under a contract for sale, which ultimately goes off, and his occupation has been a beneficial one, he may be liable in this action, but only for the period since the putting an end to the contract: *Howard v. Shaw*, 8 M. & W. 118; *Winterbottom v. Ingham*, 7 Q. B. 611; *Burrows v. Gates*, 8 U. C. C. P. 121. Where rent is mentioned in the lease or agreement, such rent will be the measure of damages; but where there is no lease, the value of the premises must be proved. Executors may sue for use and occupation of testator's land during his lifetime, but not where the agreement has been that the tenant should pay in produce, not money: *Wallace v. Harold*, 23 U. C. R. 279.

DEFENCE.

The defendant may rely on termination of tenancy, either by expiry of landlord's title, or notice to quit, or eviction, or the bringing of an action for possession of

premises for a forfeiture, or payment, or that the premises have been knowingly let for an immoral purpose.

Where it is quite evident that defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third party, the plaintiff will be non-suited: *McDonald v. Brennan*, 5 U. C. R. 599. The defendant in the case of a ready-furnished house may rely upon the defence that there has been no beneficial occupation, whether by reason of the house being infested with vermin: *Smith v. Marrable*, 11 M. & W. 5; or of defective drainage: *Wilson v. Finch Hatton*, 2 Ex. D. 336. The tenant may give up occupation, and then ceases to be liable to pay rent. Not so in the case of an unfurnished house: *Hart v. Windsor*, 12 M. & W. 68, 86. *The Statute of Limitations* is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy may be inferred, though no notice to quit has been given: *Leigh v. Thornton*, 1 B. & A. 625. If landlord has distrained, and retained the distress, though insufficient in amount, he cannot maintain the action. An action of covenant for non-payment of rent does not lie by the lessor against the lessee, where the lessor has parted with his reversion in part of the property since the lease; the rent being entire and not apportionable: *Rector, etc., of Sackville v. Bacon*, 6 All. 134 (N.B.) Action for, does not lie against party who goes into possession under contract which fails. Where a vendor lets a vendee into possession of lands on a contract which afterwards goes off he cannot recover for use and occupation: *Temple et al. v. McDonald*, 2 Old. 155 (N.S.). To maintain an action for use and occupation there must be some evidence of a holding by permission of the plaintiff; therefore, where there is no evidence of any contract or negotiation, and it appears that at an interview between the parties about the property, the defendant refused to make any arrangement and claimed the title, it was held that the action would not lie: *McCulley v. Ward*, 5 All. 505 (N.B.).

No occupation rent should be charged against one who has been in occupation of land under mistake of title in respect of the increased value thereof arising from improvements which are not allowed him: *McGregor v. McGregor*, 5 O. R. 617.

ACTION FOR WASTE, BAD HUSBANDRY, ETC.

To obtain an injunction against the tenant to restrain waste it must be proved that what the tenant is doing is prejudicial to the inheritance. If it improves the value of the land it is not waste. Ameliorating waste discussed: *Meux v. Copley* (1892), 2 Ch. 253.

An action for permissive waste will not lie against a tenant for life. *In re Cartwright*, 41 Ch. D. 532. followed. The spread of

noxious weeds from natural causes, or by the action of cattle depositing or eating hay or straw coming from the fields where the weeds were, and the failure to stop the growth thereof, is no evidence of waste but only of ill husbandry, and the fact that there is a statute, R. S. O. 1887, c. 202, for the prevention of the spread of noxious weeds does not make any difference: *Patterson v. Central Canada L. and S. Co.*, 29 O. R. 134.

Action for waste lies on a contract not under seal, express or implied, and is in some cases founded on wrong, independent of contract, arising out of the relation of landlord and tenant. In the former case the plaintiff must prove the contract, and the acts complained of which form the violation of the contract. In the latter case the plaintiff will have to prove the demise, the breach of covenant, and in both cases the damage.

The general rule as to waste in common law is, that in order to constitute it there must be a diminution of value of the estate by it, or an increased burden upon it, or an impairing of the evidence of title: *Huntley v. Russell*, 13 Q. B. 572. The right of a remainderman to sue tenant for life for waste arises when the waste is committed, and the Statute of Limitations then begins to run: *Higginbotham v. Hawkins*, L. R. 7 Chy. 676. In this action the defendant is entitled to the verdict unless the damages are substantial: *Doherty v. Allman*, 3 App. Cas. 733. The measure of damages is the diminution of the value of the reversion, less a discount for immediate payment: *Witham v. Kershaw*, 16 Q. B. D. 613, C. A. Where the intention of the testator requires that an estate, devised in terms larger than a mere life estate, shall be cut down to a life estate in order to give effect to other conflicting dispositions of the same property, there the Court will deal with such a life estate as one unimpeachable for waste. In this case *White v. Briggs*, 2 Phil. 583, distinguished, and life tenant held liable for waste: *Clow v. Clow*, 4 O. R. 355. Protection of contingent interest, 17 S. C. R. 343. A tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber; but he cannot cut down timber even for the same purpose and sell it: *Saunders v. Breakie*, 5 O. R. 603. A tenant who for the purpose of rendering the land more fit for cultivation collects the stones therefrom has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them: *Lewis v. Godson*, 15 O. R. 252. A tenant in common is not liable to his co-tenants for cutting timber on the common property: *Munsie v. Lindsay*, 10 P. R. 173. If the reversion be not injured by the acts complained of, there can be no waste and no forfeiture: *Holderness v. Turner*, 11 O. R. 1; *Cromford v. Burt*, 12 O. R. 5. It is not waste

10 : tenant for life to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry: *Drake v. Wigle*, 24 U. C. C. P. 405; *Cooke v. Edwards*, 10 O. R. 341. It is a question for the jury to find if the acts complained of amount to a breach of the covenant not to commit waste: *Campbell v. Shields*, 44 U. C. R. 449. The obligation to good husbandry arises either by contract or mere relation of tenant, not with us from local custom. As to custom: see *Burrowes v. Cairns*, 2 U. C. R. 288, followed in *Kaatz v. White*, 19 U. C. C. P. 36. As to proof of breach of covenant to repair or to use good husbandry, see *post* under covenants. In the absence in a lease of an express covenant to repair by the lessee he is not liable for permissive waste, and an accidental fire by which the leased premises are burnt is permissive, not voluntary waste: *Wolfe v. McGuire*, 28 O. R. 45. In an action on the case of waste by one tenant in common against his co-tenant, the damages must be confined to the actual injury done to the premises, and to such portion thereof as the plaintiff's undivided share bears to the whole estate: *Linton v. Wilson*, 1 Kerr 223 (N.B.). If a tenant cuts down trees for the purpose of clearing wilderness land, they belong to him, and the cutting is not waste; but the onus lies on him to shew that they were cut for that purpose; and per Chipman, C.J., Carter, J., and Parker, J., they should be cut with a present intention of clearing the land. But per Street, J., if the tenant intended to clear the land at any time during the term it was not waste: *Rector, etc., of Hampton v. Titus*, 1 All. 278 (N.B.).

A tenant, who for the purpose of clearing the land and rendering it more available for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value, if he disposes of them. *Saunders v. Breakie*, 5 O. R. 603, commented on: *Lewis v. Godson*, 15 O. R. 252.

It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees or of shortening their lives, or injuring them for timber purposes; and if so found a covenant not to cut down timber, except for the lessee's use or for purposes of improvement on the premises, will be broken by such tapping. The general question of waste discussed: *Campbell v. Shields*, 44 U. C. R. 449.

Held, that *prima facie* the lessee had not the right to bore for oil, and having done so, and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause: *Lancey v. Johnston*, 29 Chy. 67.

The extent to which wood may be cut by a widow, or any one claiming under her, on wild lands assigned to her by way of dower,

before the party is guilty of waste, must be left to the discretion of the jury under the direction of the Court: *Titus, et al. v. Haines*, 2 R. & C. 542 (N.S.).

Held, after detailed review of the cases, that *Yellowly v. Gower*, 11 Ex. 274, which decided that a tenant for years is liable for permissive waste, was rightly decided, and that its authority has not been impugned or affected by any subsequent case or displaced by the provisions of the Judicature Act: *Morris v. Cairncross*, 14 O. L. R. 544.

An action for waste can be maintained during the currency of a lease for the purpose of determining whether the removal of articles annexed to the freehold is warranted: *Cullen v. McPherson*, 40 N. S. R. 241.

On determining whether an act of waste has been committed by a lessee on the demised premises the test is whether the act complained of by the lessor is an act which alters the nature of the thing demised: *West Ham Central Charity Board v. East London Waterworks Co.* (1900), 1 Ch. 624.

ACTIONS ON BILLS AND NOTES.

See Bills of Exchange Act, R. S. C. c. 119; Ch. 1908, c. 8, corrects s. 133.

A person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who has none. In the absence of circumstances to create suspicion as to the title of a transferor of a negotiable instrument, the transferee is not bound to make any inquiries into such title: *London Joint Stock Co. v. Simmons* (1892), A. C. 201.

What is a promissory note? *Trimble v. Miller*, 22 O. R. 500; *Dominion Bank v. Wiggins*, 21 A. R. 275. "I promise to pay" signed by more than one: *Kinnard v. Tewsley*, 27 O. R. 398. Where to an action on a note against the makers, defendants pleaded fraud: Held, that the note must be proved, and that as defendants had given no notice to produce, and it was not shewn that the plaintiffs or their attorney had the note in Court, the defence could not be gone into: *Bank of Montreal v. Snyder*, 18 U. C. R. 492. Under the Married Woman's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband: *Michaels v. Michaels*, 30 S. C. R. 547.

Parol evidence will not be received to shew that a person who indorsed a promissory note to another for valuable consideration, stipulated at the time that he was not to be liable on the indorsement. *Smith v. Squires*, 13 Man. L. R. 360, followed: *Emerson v. Erwin*, 10 B. C. R. 101.

Held, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note, and to enforce his rights against the other parties to it, and as it appeared that two of the defendants had endorsed the notes as sureties to the plaintiff to the makers, he was entitled to recover against them although the note was made payable to his order: *Begg v. Howlett*, 28 O. R. 473.

Time when statute begins to run.—The bill of exchange in this action fell due on the 1st December, 1875, and the writ issued on 1st December, 1881:—Held, that the statute began to run on 2nd December, 1875, and therefore this action was commenced in time: *Sinclair v. Robson*, 16 U. C. R. 211, remarked upon: *Edgar v. Magee*, 1 O. R. 287.

Where an agent accepts or indorses "per pro," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority, and where an agent has such authority his abuse of it does not affect a bona fide holder for value: *Bryan v. Quebec Bank* (1893), A. C. 170.

"I promise to pay," signed by two is joint and several: *Oreighton v. Fretz*, 26 U. C. R. 627. See s. 84, Bills of Exchange Act.

Solicitor's Clerk.—A firm of solicitors in whose name a note has been placed for suit got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit:—Held, that he was the lawful holder: *Shepley v. Hurd*, 3 A. R. 449.

What is a sufficient notice of dishonour, when the facts are undisputed, is a question of law: *Bank of Upper Canada v. Smith*, 4 U. C. R. 483.

Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must, without undue delay, present the cheque for payment, and if it is dishonoured notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done the creditor will be taken to have accepted the cheque in payment of the debt and the debtor is discharged: *Sawyer v. Thomas*, 18 A. R. 129.

A notice of non-payment addressed merely "to the executrix, or executor of the late Mr. Jones, Toronto," is bad: *Bank of British North America v. Jones*, 8 U. C. R. 86.

A promissory note was payable in eighteen months after date, with interest at seven per cent. per annum, payable half yearly:—Held, that in order to bind the indorser, it was necessary to present the note for each instalment of interest and give him notice of dishonour: *Jennings v. Napanee Brush Co.*, 4 C. L. T. 595.

Remarks as to the practice in this country of taking notes for discount not from the last indorser, but from the maker, who brings

them indorsed, thus suggesting not a business transaction, but accommodation indorsements: *Bank of Montreal v. Reynolds*, 25 U. C. R. 352.

Power of partner to indorse his partner's names on cheques: *Manitoba Mortgage Co. v. Bank of Montreal*, 17 S. C. R. 632.

If a bank refuse to pay a cheque, having sufficient funds of the drawer for the purpose, the holder can compel payment in equity. But the fact of there being sufficient at the drawer's credit in the Bank ledger when the cheque was presented, is immaterial, if the ledger did not shew the true state of the account: *Gore Bank v. Royal Canadian Bank*, 13 Chy. 425.

A note made here payable at a place in the United States, but not "not otherwise or elsewhere," is payable generally, and the law and good currency of the place of contract must govern: *Hooker v. Joshe*, 27 U. C. R. 235.

Plaintiff and defendant resided about three miles apart; the mail ran between both places, and closed where plaintiff resided on Monday, Wednesday and Friday in each week; the bill was presented for payment on Monday the 4th, being the last day of grace, and not paid; there being no mail on the 5th, notice was served on the defendant by a special messenger on the 6th, before it could have reached him had it been mailed on that day:—Held, in good time: *Chapman v. Bishop*, 1 U. C. C. P. 422.

A foreign bill may be referred to the master for computation: *Meyer v. Hutchinson*, 16 U. C. R. 476.

Interest made payable by a note is part of the debt.

A note made here, promising to pay V. or order, at Chicago, \$ American currency:—Held, a good promissory note: *Third National Bank of Chicago v. Crosby*, 41 U. C. R. 402; see *Wallace v. Souther*, 16 S. C. R. 717.

Under the circumstances of this case the cheques must be regarded as payable to fictitious or non-existing persons, and therefore under s.s. 3 of s. 7 of the Bills of Exchange Act, 1890, payable to bearer, and that the bank had the right to pay and charge the company with the amounts. *Governor and Company of Bank of England v. Vagliano* (1891), A. C. 107, followed: *London Life Insurance Company v. Motsons Bank*, 8 O. L. R. 238.

In an action upon two promissory notes for \$3,000 and \$4,000 respectively, the defendant set up a plea of consideration and that the plaintiff was not a *bona fide* holder for value. At the trial the defendants tendered evidence, which was refused, to show that the notes were given merely as receipts for stock which had been delivered to defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff, who was a clerk in the office of his solicitors, had given no value therefor; also that a written agreement

for the transfer of the stock made between the payee of the note and another, and one of the defendants' firm, had never been acted upon, or had been abandoned: Held, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them, a new trial was directed: *Clarke v. Union Stock Underwriting Co.*, 13 O. L. R. 102.

When a promissory note is taken from a borrower as collateral security for money lent to him, and not in payment, an action can be brought for the money lent, notwithstanding that, owing to the form of the note, an action thereon could not be maintained: *Secor v. Gray*, 22 Oec. N. 27, 3 O. L. R. 34.

Signature by managing director of company—personal liability: *Chapman v. Southurst* (1909), 1 K. B. 927. See *Landes v. Marcus*, 25 T. L. R. 478.

The provisions of the Bills of Exchange Act as to the liability of a person who signs a bill otherwise than as drawer or acceptor are not satisfied unless the bill be complete on the face of it when signed by such person: *Jennings v. Comber* (1898), 2 Q. B. 168.

It is a good defence for a debtor sued on a debt for the discharge of which he had originally given a bill of exchange that at the time of the issue of the writ the bill, though dishonoured, was in the hands of a third party: *Davis v. Reilly* (1898), 1 Q. B. 1.

Material alteration by inserting "Limited" invalidated note. *Bank of Montreal v. Exhibit and Trading Co.*, 22 T. L. R. 722.

A promissory note does not become due when it is presented for payment and dishonoured on the last day of grace, and the holder cannot take action for the recovery of the amount of such note until the expiration of such day of grace: *Kennedy v. Thomas* (1894), 2 Q. B. 759; *Westaway v. Stewart*, 8 W. L. R. 907, 1 Sask. L. R. 200.

Where it is admitted or shewn that the maker of a promissory note has been induced to sign it by fraud, the effect of s. 58 of the Bills of Exchange Act is to throw upon an indorsee for value the onus of proving affirmatively his honesty and good faith in becoming the holder of the note. See *Union Investment Co. v. Wells*, 39 S. C. R. 625; *Jones v. Gordon*, 2 App. Cas. 616; *Peters v. Perras*, 8 W. L. R. 162, 1 Alta. L. R. 201.

The doctrine of constructive notice is not applicable to bills and notes transferred for value: *Union Investment Co. v. Wells*, *ut sup.*

Where a promissory note made by two persons in favour of the plaintiff was after maturity signed by the defendant at the plaintiff's request without any agreement or understanding for extension of time

or forbearance: Held, that the procurement of such signature was not equivalent to an agreement not to sue and in this respect no change has been made by the Bills of Exchange Act: *Ryan v. McKerral*, 15 O. R. 460; *Stack v. Dowd*, 10 O. W. R. 623, 15 O. L. R. 331.

On the back of a certain promissory note appeared the signatures of K. and B. underneath the words "We guarantee payment of within note." K. and B. held liable as endorsers. *Lock v. Reid* (1842), 6 O. S. 295, no longer represents existing law under sec. 131 of Bills of Exchange Act: *Lehigh Cobalt Silver Mines Co. v. Heckler* (1908), 18 O. L. R. 615, 12 O. W. R. 854.

An offer made after its maturity by an endorser of a promissory note to pay the same will not operate as a waiver of presentment in the absence of evidence that at the time of the offer he knew there had been default in presentment: *Ayer v. Murray* (1909), 39 N. B. R. 170.

PAYEE v. MAKER OF NOTE OR ACCEPTOR OF BILL.

Plaintiff must prove handwriting of person whose name appears as maker of note or acceptor of bill.

The acceptance is proved by evidence of the acceptor's handwriting, and the production of the bill with such proof is *prima facie* evidence of acceptance before action brought, as the presumption is that it was accepted within a reasonable time after date, according to the regular course of business, and before maturity: *Roberts v. Bethell*, 12 C. B. 778. If several (not partners) are acceptors, the handwriting of all must be proved: *Gray v. Palmers*, 1 Esp. 135. If one of several partners accepts a bill drawn on the firm, it is sufficient to prove the partnership and his handwriting in an action against all: *Mason v. Rumsey*, 1 Campbell, 384.

It is a good defence that the plaintiff had notice that the firm would not be bound by such an acceptance: *Jones v. Corbett*, 2 Q. B. 828; or that the bill was not accepted for partnership purposes, and that there was covin between the partner who accepted and the plaintiff.

After an action brought against a firm as makers and a private individual as endorser of a note had been dismissed as against the individual, a further action against him to declare him liable as partner was dismissed: *Ray v. Isbister*, 22 A. R. 12.

If the acceptance is by an agent, his authority and handwriting must be proved.

Proof of presentment is necessary against the acceptor on a qualified acceptance, but not on a general acceptance, even where the bill is payable on demand. If the bill or note be payable after sight it must be presented in order to charge the acceptor or maker.

INDORSEE v. MAKER OR ACCEPTOR.

Plaintiff must first prove the making of the note or acceptance of the bill. The acceptance admits the drawing. Then the indorsement must be proved, and, if special, it must appear that the indorsee is the person described in it.

If instrument be payable to bearer or indorsed in blank, it is unnecessary to prove a subsequent indorsement unless alleged. A promise to pay, or an offer to renew a bill or note made to the indorsee after it is due, is an admission of the holder's title, and will make the proof of indorsement unnecessary; but the admission of the indorser is evidence against him only, not against other parties.

When the indorsement is by an agent, it is necessary to show that the person by whom the indorsement is written had the authority of the person whose name is written. In such a case an authority to draw does not of itself impart an authority to indorse bills, but it is a fact which ought to go to the jury as evidence.

All the indorsements that have been stated, though unnecessary, must be proved against the acceptor: *Waynam v Bend*, 1 Campbell, 175.

By striking out intermediate indorsements the plaintiff loses the security of those indorsers. When a bill is indorsed in blank, possession is sufficient *prima facie* title, and several plaintiffs suing as indorsees need not prove that they are in partnership, or that the bill was indorsed to them jointly: *Ord v. Portall*, 3 Campbell 239. But where it is specially indorsed to a firm the partnership must be proved to consist of the plaintiffs, if sued in individual names of persons composing firm, and not firm name.

DRAWER v. ACCEPTOR.

When a bill, though not payable to the drawer's own order, has been dishonoured by the acceptor and taken up by the drawer, he may sue the acceptor: *Simmonds v. Parminter*, 1 Wilson 185.

He must prove:

1. The acceptance.

2. The presentment to the defendant and his refusal to pay, which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment.

3. The return of the bill to and payment thereof by the plaintiff.

PAYEE OR INDORSEE v. DRAWER.

The plaintiff must prove:

1. The drawing of the bill.

This must be proved by evidence of the drawer's handwriting, or, if drawn by an agent, by proving the authority of the agent and his handwriting.

2. Presentment to the drawee for acceptance, or to the acceptor for payment.

It is not sufficient to show that the bill was presented to some person on the drawee's premises without connecting him with the drawee: *Cheek v. Roper*, 5 Esp. 175. The bill must be left with the drawee for twenty-four hours, unless during that time he either accept or refuse to do so: *Van Dicom v. Victoria*, L. R. 3 P. C. 543. A part payment, or a promise to pay after the bill is due, is *prima facie* evidence as an admission that the bill was duly presented: *Isaacs v. Robertson*, 7 East 231.

3. Default.

4. Notice of dishonour.

See *Merchants Bank v. McDougall*, 30 U. C. C. P. 236. What is sufficient evidence of waiver of notice of dishonour discussed: *Britton v. Milsom*, 19 A. R. 96.

5. In case of an indorsee, the indorsements.

INDORSEE v. INDORSER.

First prove indorser's signature, which admits ability, and signature of every antecedent party; then presentment for payment or acceptance and dishonour; lastly, notice of dishonour or competent excuse for neglecting to give it.

DEFENCES TO ACTIONS ON BILLS OF EXCHANGE AND PROMISSORY NOTES.

The principal defences are as follows:

Negotiation of overdue or dishonoured bill.

Loss of bill.

Alteration.

Payment.

Failure or want of consideration.

Fraud.

Forgery.

Illegality.

Illegality of consideration.

Agreements at variance with bill or note.

Voluntary discharge and waiver.

Alteration of the position of the parties, giving time, etc.

By section 30, sub-section 4, of the Bills of Exchange Act, 1890, secs. 14, 15, 16 of R. S. C. c. 119, notes given for a patent right must have the words "given for a patent right" written or printed on such notes when issued. If not, they are void, except in the hands of a holder in due course without notice of such consideration. This provision considered: *Johnson v. Martin*, 19 A. R. 592; *Samuel v. Fairgrieve*, 24 S. C. R. 178. An accommodation note used in bad faith ordered to be delivered up: *Miller v. Plummer*, 22 S. C. R. 253. A person writing his name on the back of a non-negotiable note without more is not a guarantor, nor is he liable as endorser: *Robertson v. Lonsdale*, 21 O. R. 600. A president of an incorporated company discounted notes, using the company's name. Held, that the company must affirm or disaffirm the transaction altogether, and could not repudiate the liability on the note and at the same time take the benefit of it: *Bridgewater Co. v. Murphy*, 26 O. R. 327. A renewal of a note is not a negotiation of it within the meaning of section 75 of the Bank Act (Dom. Statutes, 1890, c. 31) so as to support a security taken at the time of the renewal in substitution for a previously existing security: *Bank of Hamilton v. Shepherd*, 21 A. R. 186. The maker of a negotiable note is not bound to pay it unless the party demanding payment produces and offers to deliver it up: *Jordon v. Coates*, 2 All. 107 (N.B.). Plaintiff gave his note for the deposit required on a purchase at auction, but subsequently refused to carry out the contract and sought to recover the amount of his note: Held, on the authority of *Black v. Gesner* and *Gray v. Whitman*, 2 Thom. 157, that he could not recover: *Lindsay v. Zwicker*, 2 N. S. D. 100 (N.S.). If in an action against the maker of a promissory note the defence is want of consideration, and that the note came into the plaintiff's possession by fraud, that question should be left to the jury: *Smith v. Fleming*, 2 Han. 147 (N.B.).

ACTION ON POLICY OF INSURANCE.

MARINE INSURANCE.

By section 2 (g) of the Dominion Insurance Act, R. S. C. c. 34, "inland marine insurance" means marine insurance in respect to subjects of insurance at risk upon the waters of Canada above the harbour of Montreal. By section 4 (a) that Act does not apply to any company transacting, in Canada, ocean marine insurance exclusively.

Cap. 105 B. C. R. S., 1897, is an Act respecting marine insurance.

The plaintiff may be called on to prove the following facts:

1. The subscription or execution of the policy by the defendant. The policy must be produced and proved, and if subscribed by an agent of the defendant the handwriting and authority of the agent must be proved. If the authority of the agent was in writing, it should generally be produced; but the authority may also be proved by shewing that the defendant has recognized the act of the agent in this instance, or in other similar instances in which he subscribed policies for the defendant: *Neal v. Erving*, 1 Esp. 61; *Brocklebank v. Sugrue*, 5 C. & P. 21.

2. The interest of the party as averred.

9 Edw. VII. c. 12 is the Marine Insurance (Gambling Policies) Act, 1909 (Imp.).

Insurances without interest, or wagering policies on British ships or goods therein, are void by 19 Geo. II., c. 37, s. 1, R. S. O. 1897. c. 339, secs. 5, 6 and 7, and the interest must be proved otherwise than by the policy itself. In the case of foreign ships interest need not be alleged or proved. A party has a right to insure property over which he has an equitable lien. Neither the actual nor constructive possession of the property is necessary to be in the insurer, either at the time of issue of the policy or when the loss insured against takes place. It is sufficient if he have an equitable lien on the specific chattel property covered by the policy: *Clark v. Scottish Imp.*, 4 S. C. R. 192.

The interest in the ship, as stated in the claim, may be proved *prima facie* by evidence of possession of the ship, or of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, etc. A common mode of proof is to call the master, who will prove that he was appointed and employed by the parties in whom the interest is averred.

The interest in goods may be proved *prima facie* like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading: *Liebharrow v. Mason*, 2 T. R. 71; *Seagrave v. Union*, L. R. 1 C. P. 305. The plaintiffs held to have an insurable interest under the agreement in evidence on goods on board when policy effected, and also on return cargo: *Merchants v. Rumsey*, 9 S. C. R. 577.

3. The putting of the goods on board when the policy is on goods.

The shipment of goods on board is usually proved by the captain. If he be dead, the production of the bill of lading and proof of his

handwriting will be evidence of the shipping. In an action upon a policy on freight the assured must shew that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so: see *Potter v. Rankin*, L. R. 6 H. L. 83.

4. The inception of the risk.

Where the vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage or risk must be given: *Koster v. Innes*, Ry. & M. 333. This may be proved by some of the crew, or proof of a particular destination by charter party will afford a presumption that she sailed on the chartered voyage. The risk in the case of a voyage policy on the ship to a port, without any provision as to her safety there, terminates when she is anchored at the port in the usual place for discharge of her cargo: *Stone v. Marine Ins. Co.*, 1 Ex. D. 81. But the policy usually extends in terms to the end of a period of twenty-four hours after mooring in safety in port. In the case of goods the risk depends on the agreement of the parties, but it usually begins with the loading on board and ends with the safe discharge, including their passage to the shore by usual means.

5. Compliance with warranties.

Warranties may be either express or implied. Implied warranties are: (1) That there shall be no deviation from the voyage insured; (2) That it shall be commenced without unreasonable delay; (3) That all material circumstances shall be disclosed to the underwriters; (4) That the ship shall be seaworthy. A breach of these conditions avoids the policy, whether there be fraud or not. An express condition against storing of oil not infringed by a small quantity of lubricating oil for engine: *Mitchell v. City of London Ass. Co.*, 15 A. R. 262.

6. A license for the purpose of legalizing the voyage in some cases, e.g., in case of war trading with an alien enemy.

7. The loss.

A loss may be total or partial, and a total loss may be either actual or constructive. Where the loss is actually total no abandonment is necessary to found a claim, e.g., where the ship is lost, or destroyed, or captured, or reduced to a wreck. In order to make out a constructive total loss the plaintiff must shew that the cost of repair would have exceeded the value of the ship when repaired. In order to justify an abandonment there must have been that in the course of the voyage which at the time constituted a total loss: *Holdsworth v. Wise*, 7 B. & C. 794. The condition of payment was a report of loss which was to be subsequently adjusted: Held, adjustment not a condition precedent to right to recover: *Bank of B. N. A.*

v. Western, 7 O. R. 155. A mortgagee can recover in case of an actual total loss. He is not precluded from recovering as for a constructive total loss upon giving notice of abandonment: *Anchor v. Keith*, 9 S. C. R. 483. As to liability of reinsurer, see *Phoenix v. Anchor*, 4 O. R. 524.

Notice of abandonment must be given. It may be made orally.

8. The amount of it.

In open policies the assured must prove the extent of his loss.

In valued policies, if the loss be a total one, the assured is only bound to prove some interest in the ship or goods. Where the loss is partial the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in the case of an open policy.

The amount recoverable depends on the value of the thing insured, the sum insured and the amount of loss.

Generally policy requires action to be commenced within a certain time. See *Robertson v. Pugh*, 15 S. C. R. 706.

In ascertaining the loss in an action on an open policy the true value of the thing insured is the criterion; but on a valued policy the assured can only recover to the amount that the thing is valued in the particular policy, and if he has already received that value on another policy he cannot recover anything further, although the true value and the loss be beyond what he has already received: *Bruce v. Jones*, 1 H. & C. 769; *Anchor v. Phanix*, 6 A. R. 567.

Claim for return of premium is often added to a claim on the policy, and the question of the right to recover arises on the failure of the plaintiff to establish his case on the policy. See *Western v. Scanlan*, 13 S. C. R. 207.

Where policy is void *ab initio*, or where there is no insurable interest innocently, premium or part of it may be recovered. If the risk has never commenced there must be a return, or if the policy is avoided by failure of warranty without fraud.

On average, *Western Ass. Co. v. Ont. Coal Co.*, 20 O. R. 295.

To give rise to a claim for general average contribution there must have been a general average act or something following a general average act and so intimately connected with it that the whole thing may be treated as one continuous act necessary to relieve the whole venture from a common peril. If the consequence of a peril of the sea is merely to render the ship unable to fulfil her contract or the cargo unfit to be carried on—there being no common peril—acts done to make the ship fit to fulfil her contract or the cargo fit

to be carried on do not constitute general average expenditure: *Hamel v. P. S. O., etc.* (1908), 2 K. B. 298.

Every vessel submerged in a river is not *ipso facto* to be deemed a constructive total loss. The total loss of its cargo rendering the further prosecution of the particular voyage or adventure "not worth pursuing" does not, in itself, warrant a finding that the vessel is a constructive total loss: *Sedgwick v. Montreal Light, etc., Co.*, 41 S. C. R. 639.

"Contraband of War" does not apply to persons but only to property: *Yangtze Insurance Association v. Indemnity Marine Ass. Co.* (1908), 2 K. B. 504.

Section 502 of the Imp. Merchant Shipping Act, 1894, which exempts the shipowner from liability to make good damage happening without his default, where goods on board are damaged by fire, does not apply to claims on general average: *Greenshields v. Stephens* (1908), A. C. 431.

DEFENCES.

Any special defence must be set up, such as insufficient subscription, concealment, misrepresentation, fraud, illegality.

Held, that the condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it: *Meagher v. Home Insurance Co.*, 11 U. C. C. P. 328; *Meagher v. Aetna Insurance Co.*, 20 U. C. R. 607. There is an implied condition in a contract of marine insurance not only that the voyage shall be accomplished in the ordinary track or course of navigation, but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or inexcusable delay either in commencing or completing the voyage alters the risk, and absolves the underwriter from liability from subsequent loss. In case of deviation by delay as in case of departure from the usual course of navigation it is not necessary to shew that the peril has been enhanced in order to avoid the policy. Judgment appealed from (21 N. S. Rep. 244) affirmed: *Spinney v. Ocean Mutual Marine Ins. Co.*, 17 S. C. R. 326. Notice of abandonment must be given by the legal owner of a vessel. Where such notice was given by an equitable owner, and a verdict recovered against the underwriters as for a constructive total loss, the verdict was set aside; the plaintiff only being entitled as equitable owner to recover for partial loss: *Millidge v. Stymest*, 6 All. 164 (N.B.). A mere error or defect in judgment or negligence on the part of the master (although the result is the total loss of the property insured), where there has been no criminal or fraudulent intent, is not barratry: *Wolff v. The Merchants Insurance Co.*, vol. 31, 577 (N.B.). It is not the state of the vessel at the time

The notice of abandonment is given, but its condition at the time of action brought, that determines whether the loss is a total or partial one: *Kennedy, et al., v. Halifax Marine Ins. Co.*, 1 Thom. (1st Ed.) 143; (2nd Ed.) 141 (N.S.). To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated: *Cossman v. West*; *Cossman v. British American Ass. Co.*, Consolidated Appeals, 11 R. 13 App. Cas. 160 (N.S.). A time policy unless there be special restrictions confers the power of sailing from any port, domestic or foreign, and in this province foreign employment must be understood to be as much in the contemplation of the owner and insurer as domestic use: *Avon Marine Ins. Co. v. Barteaux*, 2 N. S. D. 195 (N.S.). Whether a delay in a voyage is unjustifiable or not is a question of law for the Judge; but whether unreasonable or not is a question of fact: *Reed and another v. Waller*, 1 Har. 430 (N.B.). The proper test in respect to goods which have been sea damaged and taken to an intermediate port, whether memorandum articles or not, is not whether an uninsured owner would have sold them there, but whether they can be sent on to their destination at a less expense than their value on arrival there, for when the whole or any part of the cargo can be sent on the master has no authority to sell, nor can the assured recover for a total loss: *Watson v. Mercantile Marine Ins. Co.*, 5 N. S. D. 396 (N.S.).

Actions for Salvage.

By s. 951 of the Canada Shipping Act, R. S. C., c. 113, the Imperial Merchant Shipping Act, 1894, is repealed so far as relates to ships registered in Canada. Sections 757 to 772, inclusive, of the Canadian Act relate to claims for salvage. As to salvage: *International Wrecking Co. v. Lobb*, 11 O. R. 308.

Salvage is an obligation of an exceptional nature, to indemnify those by whose assistance a ship, her cargo, or the lives of those on board are saved from imminent loss. The element of danger and imminent loss to the ship, etc., is essential, and, without it, no claim to salvage can arise: *Montreal Lighterage Co. v. Gordon*, O. R. 28 S. C. 198. Salvage is not always a mere compensation for work and labour; various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather

to assist a vessel in distress, risking their own lives to save their fellow creatures, or to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued, whether it were in imminent peril, and almost certainly lost if not at the time rescued and preserved; thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied; lastly, the value. Where all these circumstances concur a large and liberal reward ought to be given, but where none or scarcely any take place the compensation can hardly be denominated a *salvage* compensation; it is little more than a mere remuneration *pro opere et labore*: *The W. G. Putnam*, Y. A. D. 271; see also *The Vanguste Andre*, Y. A. D. 201.

Salvage (apart from life salvage) is by the maritime law of England confined to ship, apparel and cargo, or what has formed part of these, and to freight earned by carriage of cargo, and is not applicable to a gas float used as a floating beacon, which, though capable of being moved on the face of the water, is not a "ship or vessel" in the sense in which the Merchants Shipping Act used these terms, or in any fair sense of the words: *Gas Float Whitton* (No. 2), 66 L. J. P. 99; (1897), A. C. 337; 76 L. T. 663; 8 Asp. M. C. 272.

In assessing value of ship, besides annual depreciation, original construction and subsequent care, as well as type of vessel must be considered: *Dunsmuir v. The "Otter,"* 10 W. L. R. 380. Effect of delay in delivering salvaged goods to receiver of wrecks considered: *The Manhattan v. Sullivan*, 11 Ex. C. R. 151.

Under a claim for life salvage, risk or serious apprehension of danger to the lives of those who have been rescued will entitle those rendering the services to life salvage even if the lives of those rescued were not in actual danger. The pecuniary value of the life of any one saved cannot be taken into account. Where the services can be adequately recompensed by an inconsiderable sum, the huge value of the vessel and her cargo is not an element of importance: *The Suevic* (No. 1), 77 L. J. P. 92; (1908), P. 154; 98 L. T. 188; 11 Asp. M. C. 16,

FIRE INSURANCE.

The Statutes of the Dominion and Provinces relating to fire insurance are as follows:—

Dominion—The Insurance Act—R. S. C. c. 34. Part III. of this Act relates to Fire and Inland Marine Insurance. By section 107 no fire policy shall be issued for or extended over three years. The Act does not apply to companies under Provincial Acts carrying on business wholly within the limits of the incorporating Province.

In the Provinces the Statutes relating to uniform conditions in policies are as follows:—

British Columbia, 1893, c. 12; 1895, c. 22; 1896, c. 22.

Manitoba, R. S. 1902, c. 87; 1904, c. 26.

Nova Scotia, R. S. 1900, c. 147; 1903-4, c. 21.

N. W. T., 1903 (1), c. 16; 1903 (2), c. 20.

Insurance Policies:—

British Columbia, R. S. 1897, c. 82; 1900, c. 17.

Nova Scotia, R. S. 1899, cc. 30, 31.

Insurance and Insurance Companies:—

Canada, R. S. 1906, c. 34; 1908, c. 69.

Manitoba, R. S. 1902, c. 82; 1904, c. 27.

Ontario, R. S. 1897, c. 203; amended 1898, c. 2; 1899, c. 21; 1900, c. 17, ss. 23-28; 1901, c. 21; 1902, c. 12, s. 22; 1903, c. 15; 1904, cc. 10-15; 1907, c. 36; 1908, c. 33, s. 45; 1908, c. 14; 1909, c. 26, ss. 43 to 46.

Statutory conditions are contained in s. 168 of R. S. O. 1897, c. 203.

Weather Insurance is provided for by Ont. Statutes 1904, c. 16.

Mutual Fire Insurance Companies' Act:—

British Columbia, 1902, c. 35; 1903, c. 13; 1904, c. 27.

Manitoba, R. S. 1902, c. 85.

N. W. T. 1903 (2), c. 21.

The conditions set out in section 168 of R. S. O., c. 203, known as the "statutory conditions," are deemed to be part of every fire insurance contract in Ontario. Variations to be binding must comply with directions of sections 115 and 116 of that Act. If there are any other than statutory conditions they are only valid in so far as they may be held by the Court just and reasonable. Technical or unsubstantial objections to proofs of loss furnished to companies are to be disallowed (section 118).

On condition 9. Divided risks. See *McCausland v. Quebec Fire Ins. Co.*, 25 O. R. 330. Distinction between first and fourth conditions pointed out: *Dunlop v. Usborne*, 22 A. R. 364. Where the business of a partnership is taken over by a limited liability company formed for that purpose there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of change: *Peuchen v. City Mutual Co.*, 18 A. R. 446. Insurance by mortgagee held to have been effected for benefit of mortgagor. The interest of the mortgagees was the same as if they were assignees of a policy effected with the mortgagor and payment to the mortgagees discharged the mortgage. The company were not justified in paying the mortgagees without first contesting their liability to the mortgagor, and establishing their indemnity from liability to

him; not having done so, they could not in an action by the mortgagor raise any questions which might have afforded them a defence in an action against them on the policy: *Imperial v. Bull*, 18 S. C. R. 697, affirming 15 A. R. 421. Followed in *McKay v. Norwich*, 27 O. R. 251. Mortgagees held not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys: *Re Union Assurance Co. v. Lang*, 23 O. R. 627. Contract for sale of insured building no change of title: *Ardill v. Citizens*, 22 O. R. 529.

The Mortgage Act, R. S. O., c. 121, s. 4, is intended to take the place and extend the operation of Imp. Act, 14 Geo. III., c. 78, which was held to be in force in this Province, and to be enforceable by a mortgagee: *Stinson v. Pennock*, 14 Chy. 604. The Imperial Act was repealed as to Ontario by 50 Vict. c. 26, s. 154. Section 4 of R. S. O. c. 121, is considered in *Edmonds v. Hamilton*, 18 A. R. 347. The decision in *Edmonds v. Hamilton* was that where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest. See *Waterous v. McCann*, 21 A. R. 486. See now Ont. Stats. 1910, c. 51, sec. 5, which declares rights of mortgagee.

It is necessary to shew an interest in the subject insured at the time of insuring and of the fire: *Howard v. Lancashire*, 11 S. C. R. 92.

Being a contract of indemnity, the assured can only recover the actual loss or damage sustained by him, according to the real quantities and value of the goods at the time of the fire: *Caldwell v. Stadacona*, 11 S. C. R. 212. An unpaid vendor who by agreement with his vendee has insured the property sold, may recover its full value in case of loss, though his interest may be limited, if when he effected the insurance he intended to protect the interest of the vendee as well as his own.—The fact that the vendee is not the sole owner need not be stated in the policy nor disclosed to the insurer: *Keefer v. Phoenix Ins. Co.*, 31 S. C. R. 144. A condition in a policy of fire insurance provided that no action should be maintainable against the company for any claim thereunder until after an award obtained in the manner provided, fixing the amount of the claim. Held, that the making of such award was a condition precedent to any right of action to recover for a loss under the policy: *Guerin v. Manchester Fire Assur. Co.*, 29 S. C. R. 139. The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different: *Canadian Fire Insurance Co. v. Robinson*, 31 S. C. R. 488.

Where the evidence is contradictory regarding the effectiveness of a policy it and the assignment must be accepted according to their purport. The company will be estopped denying the non-payment of the premiums where same was charged to their agent and has not been disputed until action. Overvaluation of goods not knowingly made cannot be taken advantage of by defendants: *Trotter v. Western Fire Ins. Co.*, 9 W. L. R. 661.

"Keeping of gasoline construed: *Equity Fire Ins. Co. v. Thompson*, 41 S. C. R. 491; *Mitchell v. London*, 15 A. R. 262, distinguished.

Vendors' liens not material to risk, nor the giving a chattel mortgage subsequent to the application for insurance: *Fritzeley v. Germania*, 19 O. L. R. 19; 14 O. W. R. 18.

Cessation of occupancy. Premises re-occupied at time of loss. Effect of, *Payson v. Equitable Fire Ins. Co.*, 5 E. L. R. 186, 28 S. B. R. 426.

An arbitration clause in policy more stringent than statutory clause rejected: *Cole v. London Mutual*, 10 O. W. R. 930, 15 O. L. R. 619. Every statement in an insurance application was by a provision in the policy made a warranty. Being an addition to statutory condition, the R. S. N. S. c. 147, must be complied with to make warranty effective: *McNutt v. Western Assce. Co.*, 40 N. S. R. 375. Effect of change material to risk by tenant without knowledge of landlord: *London & Western Trusts Co. v. Canadian Fire Ins. Co.*, 8 O. W. R. 872, 13 O. L. R. 549.

LIFE INSURANCE.

Same general line and same defences, remembering that this is not a contract of indemnity: *Confederation v. O'Donnell*, 13 S. C. R. 218; *North American v. Craigen*, 13 S. C. R. 278; *Manufacturers' Life v. Gordon*, 20 O. R. 323.

The following are the Statutes of the Dominion and of the Provinces which relate to this subject:—

Dominion, R. S. C. 1906, c. 34; 1908, c. 69.

Ontario Ins. Act., R. S. O. 1897, c. 203. (Amendments stated above under Fire Insurance.)

Manitoba, R. S. 1902, c. 82. (Amendments above.)

New Brunswick 1905, c. 4; 1907, c. 7.

Nova Scotia 1903, c. 15; 1903-4, c. 22.

Insurance for Benefit of Wives and Children:—

British Columbia, R. S. 1897, c. 104.

Manitoba, R. S. 1902, c. 83.

New Brunswick, C. S. 1903, c. 80.

PRECEDENCE—(1) NON-PAYMENT OF PREMIUM NOTE.

A condition in a life policy provided that if any premium or note given therefor was not paid when due the policy should be void. Where a note given for a premium under said policy was partly paid when due, and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void. A demand for payment after the maturity of the renewal is not a waiver of the breach of condition so as to keep the policy in force: *McGeachie v. North American*, 23 S. C. R. 148. See *Frank v. Sun Life*, 23 S. C. R. 152, in which case the policy did not contain a condition that it was to be void if the premiums were not paid. The premium notes did so provide, and the insured died when one note was overdue and unpaid. In *Manufacturers' Life v. Gordon*, 20 A. R. 309, the Court applied above case of *McGeachie v. North American*, and declined to continue the liability on a policy beyond default in payment of a premium note; proceedings on the note were no waiver of the default.

Effect of the company's technical triviality to escape payment: *Whitehorn v. Can. Guardian Life* (1909), 14 O. W. R. 804, 19 O. L. R. 535.

The failure of a member of a fraternal society to comply with the conditions of the constitution, even if arising from his insanity, and his subsequent suspension for non-payment of dues are fundamental objections to any right to recover under his certificate of insurance: *McCuaig v. I. O. O. F.* (1909), 14 O. W. R. 935, 19 O. L. R. 612.

Lapse of policy—revival by subsequent payment: *Seery v. Federal Life*, 5 E. L. R. 406. A person who applies for and receives a policy of life insurance and gives his promissory note for the amount of the first premium, but refuses to pay and returns the policy, is liable on the note though the policy becomes void by reason of the non-payment of the note: *Mfrs. Life Ass. v. Rowes*, 5 W. L. R. 405, 16 Man. L. R. 540; *Royal Victoria Life Co. v. Richards*, 31 O. R. 483, distinguished.

(2) APPORTIONMENT OR DISPOSAL OF POLICY.

A bequest of a life policy to the testator's wife is a valid declaration of trust within the meaning of R. S. O. c. 136, s. 5: *McGibbon v. Feegan*, 21 A. R. 87. The Act of 1896 covers the decision in this case, and in those of *Re Lynn*, 20 O. R. 475, and *Beam v. Merner*, 24 O. R. 189. See also *Re Cameron*, 21 O. R. 634, to same effect. *Re Grant*, 26 O. R. 130, 485, is superseded by above Act. Even under the amending Act the insured has only a limited power to vary the policy or declaration of apportionment. While he may vary he cannot destroy the trust created by the policy: *Neilson v. Trusts Cor-*

poration, 21 O. R. 520; *Mingaud v. Packer*, 19 A. R. 290; *Scott v. Scott*, 20 O. R. 313. A contract for the surrender of a life policy, unlike a contract for life insurance, is not *uberrime fidei*: *Potts v. Temperance & General*, 23 O. R. 73. A man insured his life in favour of his wife S., S. died and the husband married again, and died leaving a widow and children without having altered the direction as to the policy. The provision for payment lapsed, and the policy moneys belonged to the personal estate of the husband: *Re Eaton*, 23 O. R. 593. The interest of a wife in a policy effected by her husband on his own life declared by him to be for her benefit under the Act is her separate estate, and may in her husband's lifetime be assigned by her, subject to the powers conferred on him by the Act: *Graham v. Canada Life*, 24 O. R. 607. Where an insurance was effected upon the life of a person for the benefit of her father, brothers, and sisters, the plaintiffs, the insured, could not by any act of hers deprive them of the interest vested in them: *Dolen v. Metropolitan Life*, 26 O. R. 67. A contract of life insurance is complete on delivery of the policy to the insured, and payment of the first premium. Where the insured being able to read has had ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, has neglected to do so he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon: *Provident Savings Life Assur. Soc. v. Mowat*, 32 S. C. R. 147. If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit, and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. III., c. 48, s. 1 (Imp.): R. S. O. 1897, c. 339, s. 1. The Act applies to an endowment as well as to an all life policy. In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation. *Davies and Mills, J.J.*, dissenting. *Brophy v. North American Life Assurance Co.*, 32 S. C. R. 261.

A life insurance policy (not coming within the Act respecting Life Insurance for the benefit of Wives and Children) and the money to become due under it, belong, the moment it is issued to the person named in it as beneficiary. There is no power in the insured to transfer to any other person than the beneficiary. When the beneficiary dies the right to the money passes to the personal representative of the beneficiary not to the insured or his representative: *Re McGregor*, 10 W. L. R. 435, 18 Man. L. R. 432; *Wicksteed v. Munro*, 13 A. R. 486, said to depend on special Ontario legislation.

A policy may be made payable to a person or beneficiary who is without insurable interest in the life of the insured: *Re McGregor*, *supra*; *N. A. Life A. Co. v. Craigie*, *supra*, followed.

Re-apportionment—provision in will not operating as: *Boyer v. Boyne*, 5 E. L. R. 84, 4 N. B. Eq. 48. See also *In re Anderson's Estate*, 3 W. L. R. 127, 16 Man. L. R. 177.

Identification of policy not sufficient. Extrinsic evidence not permissible to prove that testator must have referred to it because he had no other policies: *In re Cochrane and A. O. U. W.*, 11 O. W. R. 359, 16 O. L. R. 328.

Transfer to beneficiary who is also a creditor upheld: *Re Kemp; Johnson v. A. O. U. W.*, 11 O. W. R. 91, 15 O. L. R. 339.

BENEFIT SOCIETIES.

A certificate of a benevolent society was payable on death, half to the father and half to the mother of the beneficiary. An incomplete transfer to wife married subsequently not upheld: *Simmons v. Simmons*, 24 O. R. 662. Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificate can be legally issued. Death before the ceremony of initiation makes the certificate not enforceable: *Devins v. Royal Templars*, 20 O. R. 259. A member of a benefit society was struck off on an enquiry improperly conducted. His executor was held entitled to recover: *Gravel v. L'Union St. Thomas*, 24 O. R. 1.

EMPLOYERS' LIABILITY POLICIES.

In the nature of guarantee contract. Upon the true construction of sub-section 2 of section 33 of the Ontario Insurance Corporations Act, 1892, the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not in stated terms limited to cases in which such misstatements were material to the contract: *London West v. London Guarantee*, 26 O. R. 520. On a policy to indemnify on condition that the guarantor company's solicitor managed the proceedings, an offer by plaintiff the day before trial to hand over conduct to such solicitors not sufficient: *Wythe v. Manufacturers*, 26 O. R. 153.

Employment of child under fourteen years old without knowledge of insured, latter held entitled to recover against company: *Morton v. Ontario Acc. Ins. Co.* (1909), 14 O. W. R. 1010, 1 O. W. N. 199. Neglect of insured to supervise employee and to pursue remedies may deprive of indemnity: *St. Edouard School, &c., v. Employers' Liability Ass. Corp.*, Q. R. 16 K. B. 402. See also *Dominion Paving and Contracting Co. v. Employers' Liability*, 5 O. W. R. 400.

Fidelity bonds are guarantees. See *Crown Bank v. London Guarantee and Accident Co.*, 12 O. W. R. 349, 17 O. L. R. 95. As to withholding from surety information: *Chicago Life Co. v. Duncombe* 10 O. W. R. 425.

ACTION ON CONTRACT OF AFFREIGHTMENT.

Lies by or against a shipowner, whether ship be general or sealed. Contract need not be under seal.

SHIP OWNER V. CHARTERER OR MERCHANT.

In case of a general ship, the bill of lading.

In case of a chartered ship, the charter party is the proof of the contract.

A bill of lading is a receipt for the goods, with an obligation to transport the same.

R. S. C. c. 118, an Act respecting Bills of Lading, is as follows:

2. This Act may be cited as the Bills of Lading Act.

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.

3. Nothing in this Act contained shall prejudice or affect,—

(a) any right of stoppage in transitu; or

(b) any right of an unpaid vendor under the Civil Code of Lower Canada; or

(c) any right to claim freight against the original shipper or owner, or

(d) any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

4. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading has actual notice, at the time of receiving the same, that the goods had not in

fact been laden on board, or unless such bill of lading has a stipulation to the contrary: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder or of some person under whom the holder claims.

Ont. Stats. 1910, chap. 63, (the Mercantile Amendment Act) in section 7 contains identical provisions with the above (except 2b).

Section 3 of the Bills of Lading Act, 1855, does not operate to make a bill of lading conclusive as to the statement of marks upon the goods shipped, when those marks do not affect or denote substance, quality or commercial value: *Parsons v. New Zealand Shipping Co.*, 69 L. J. Q. B. 419; (1900) 1 Q. B. 714; 82 L. T. 327; 9 Asp. M. C. 33; 5 Com. Cas. 179.

A charter party commonly contains clauses—

On part of shipowner for seaworthiness, receipt and delivery of cargo, and performance of voyage, with an exception of certain perils.

On part of freighter, to load in a given time and to pay freight and demurrage.

The master of the ship is agent of the owners, and can sue and be sued in his own name, and can sign a charter party or bill of lading in his own name and bind owners.

In ordinary course consignor sends bills of lading and bills of exchange, thus transferring property and possession of goods consigned to consignee. Where sent to agent of consignor, then property does not pass until consignee accepts bill of exchange.

The right of suing upon a contract under a bill of lading follows legal title to the goods as against the indorser: *Dracachi v. Anglo-American Nav. Co.*, L. R. 3 C. P. 190.

It is the charterer's duty to present for the master's signature such a bill of lading as is not inconsistent with and not to the prejudice of the charter party: *Kruger v. Moel Tryvan Ship Co.*, 76 L. J. K. B. 985; (1907) A. C. 272; 97 L. T. 143; 13 Com. Cas. 1; 10 Asp. M. C. 465; 23 T. L. R. 677.

The signature of a bill of lading by the charterers instead of by the master is binding and sufficient: *Knutsford S.S. v. Tillmanns* (1908), A. C. 406. The ordinary term "all other conditions as per charter party" in a bill of lading does not incorporate as against a person who (not the shipper) acquires title under the bill of lading, a clause in the charter party relieving the shipowner from the consignees in regard to the carriage of his goods, of the negligence of his servants: *The Draupner* (1909), P. 219.

In an action for not loading, the plaintiff must prove his own compliance with warranties or conditions.

The description of a ship in a charter party is a warranty, but a statement of tonnage is not.

The merchant undertakes to load and unload within a certain number of days, called *lay days*, with liberty to delay the ship for a longer specified period on payment of a daily sum, which, as well as the delay itself, is called demurrage. If the charter party contains a fixed number of demurrage days as well as lay days, and the ship is, by fault of the merchant, delayed beyond them both, that is called *detention*, and is to be compensated for by damages. When no demurrage days are mentioned, all detention beyond the lay days is demurrage: see *Lord v. Davidson*, 13 S. C. R. 166. Sundays are included in days to be allowed for unless expressly excluded: *Gibbons v. Michaels Bay*, 7 O. R. 746. Freight is regulated by the contract, or, if none, by a *quantum meruit*; if part accepted, a contract to pay *pro rata* may be inferred.

Measure of damages for not loading a cargo is the amount of freight which should have been carried, deducting expenses and any profit earned during the time covered by the charter: *Smith v. McGuire*, 3 H. & N. 554.

In addition to his remedy by action, the shipowner has a lien on goods for freight. If it appears on the bill of lading that freight has been paid, the owner is estopped from claiming it: *Howard v. Tucker*, 1 B. & A. 712.

There are certain implied contracts on part of shippers, such as not to put on board without notice dangerous or corrosive matter; on part of shipowner, that the vessel be fit: *Brass v. Maitland*, 6 El. & B. 470.

An action by shipowner for damages by destruction of vessel: *Thompson v. Fowler*, 23 O. R. 644.

MERCHANT V. MASTER OR SHIPOWNER.

Master as well as owner is liable as a common carrier. See *post*, *Actions Against Carriers*. Same common law exceptions as land carrier and as mentioned in bill of lading. As to these latter, the *causa causans*, not *causa proxima*, is to be looked to: see *Hamilton v. Pandorf*, 12 App. Cas. 518.

The plaintiff must prove readiness and willingness to ship: *McKenzie v. Dancy*, 12 A. R. 319.

There are certain implied contracts on the part of the shipowner or master.

The master impliedly contracts that his vessel shall be fit for the purpose of carrying the goods. She must therefore be seaworthy.

when she starts on her voyage. As to damages where contract broken, see *McEwan v. McLeod*, 9 A. R. 239.

Where there is no stipulation as to time, the master must sail in a reasonable time, and proceed without deviation to the destined port; otherwise he will be liable to the plaintiff for any loss occasioned by the delay; or for any loss, whether by perils of the sea or otherwise, occurring during the deviation, unless the defendant can prove that the loss must have happened had there been no deviation.

Deviation is justifiable to save life, but not merely to save property: *Scaramanga v. Stamp*, 5 C. P. D. 295.

The master is bound to deliver to consignee or order of shipper on production of bill of lading and payment of freight and other lawful charges. What is a sufficient delivery depends upon the contract or upon the custom and usage of the port. Mere delivery at a wharf, and then leaving goods without notifying the arrival to the consignee, is not sufficient, and the responsibility continues until actual delivery to a person appointed to receive, or something equivalent to it: *Hately v. Merchants' Despatch*, 12 A. R. 201.

Where a ship deviates from the chartered voyage the shipowner loses the protection of the exceptions from liability contained in the charter party. In such a case the shipowner is in the position of a common carrier, and although as such he is not responsible for damage from the nature of the thing carried he must not aggravate the risk by breach of contract: *Internationale Guano, &c., v. Macandrew* (1909), 2 K. B. 360. Effect of deviation on exemptions in bill of lading: *Thorley v. Orchis S. S. Co.* (1907), 1 K. B. 660.

Seaworthiness of the ship at some time ceases to be a condition of the contract and becomes only a warranty. A breach thereafter affords damages but does not make the shipowner a common carrier and deprive him of the benefit of exceptions in the contract, or enable the goods owner to recover for damage to goods without proving that it was caused by unseaworthiness: *The Europa* (1908), P. 84. As to evidence of unseaworthiness see *Connolly v. Grenier*, 42 S. C. R. 242. If by consignee's own delay discharging has been thrown into a strike period he cannot rely on clause in charter party which excludes delays caused by strikes from lay days: *Elswick S. S. Co. v. Moutaldi* (1907), 1 K. B. 626.

The law implies an obligation to discharge with reasonable diligence where the charter party is silent on that subject: *Van Buskirk v. North River Lumber Co.*, 40 N. S. R. 532.

Where by the terms of a charter party there is no fixed time within which the charterer has agreed to load a ship, the law implies upon the charterer an obligation to load within a reasonable time, and that obligation is performed if he loads within a time which is reasonable under the circumstances existing when the agreement

must be performed, provided that such circumstances, in so far as they involve delay, are not caused or contributed to by the charterers: *Ardan Steamship Co. v. Weir*, 6 F. 294.

In a charter party, in the absence of qualification, the undertaking of the merchant to furnish a cargo is absolute, and the mere existence of circumstances, beyond the control of the shipper, which make it impracticable for him to have his cargo ready will not relieve him from paying damages for breach of his obligation: *Ardan Steamship Co. v. Weir*, 74 L. J. P. C. 143; (1905) A. C. 501; 93 L. T. 559; 11 Com. Cas. 26; 10 Asp. M. C. 135; 21 T. L. R. 723.

SHIPOWNER v. CHARTERER OR MERCHANT.

In this action the shipowner sues the charterer for not loading, or for demurrage, or for freight. A shipowner may sue shipper for contributions to general average. As to general average see under *Action on Marine Policy*.

When the vendor of goods to secure payment has consigned them to himself at the ports of shipment, and taken from the carriers bills of lading in his own name, and afterwards sent these to the purchaser without endorsing them and without completing the delivery of the goods, he alone has power to dispose of these bills of lading, and the purchaser cannot lawfully assign them to a bank to secure advances nor pledge or otherwise give title to them: *Ontario Bank v. Gosselin*, Q. R. 14 K. B. 1.

Evidence of Shipment.—Owners v. Consignees. 33 Vict. c. 19, s. 3 (O.), making a bill of lading conclusive evidence of the shipment of goods as represented therein, does not apply to cases between masters of vessels and owners of goods, but only between masters and consignees or indorsees for value: *Allen v. Chisholm*, 33 U. C. R. 237.

Bottomry Bond—Essentials of — Broker's Commissions.—The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage, or for necessities, or for provisions required for the same purpose. Furthermore in order to enable the creditor to benefit by the hypothecation the following elements must be present in the transaction:— (a) The repairs must be performed and the necessities or provisions supplied on the express condition that the claim is to be secured by a bond. (b) There must be a total absence of personal credit on the part of the owner, or the master. (c) Before pledging the ship the master should, if it was at all possible to do so, have communicated with the owner, and (d) There must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred. (2) A master gave a bottomry bond on his ship for repairs executed some time previous to the voyage

he was then prosecuting and which were done entirely on his personal credit at the time and upon the distinct understanding that he would not be required to pay for them until his return from another voyage. It also appeared that the master had not communicated with the owners before entering into the bond, although means of communication were open to him, and it was moreover shown that the ship had enough credit at the place where the bond was made to pay the whole amount of the claim:—Held, that the bond was void. (3) A ship-broker's commissions cannot be the subject of a bottomry bond: *Christian v. The "St. Joseph,"* 3 Ex. C. R. 344.

A stipulation in a bottomry bond, providing that, in the event of the ship in the course of the voyage putting into any port of refuge to repair, all moneys for the payment of which the ship, &c., has been pledged shall forthwith become due and payable, does not invalidate the bond provided that a maritime risk is in the contemplation of the parties: *The Haabet*, 68 L. J. P. 121; (1899) P. 295; 81 L. T. 463; 48 W. R. 223; 8 Asp. M. C. 605.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped. Where a shipper accepts what purports to be a full bill of lading under the circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually in the absence of fraud or mistake escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent: *North-West Transportation Co. v. McKenzie*, 25 S. C. R. 38.

Where a vessel is detained by the charterers beyond the agreed time for loading, and is lost in a storm during such detention, the loss of the vessel is too remote a consequence of the detention to form the subject of an action against the charterers: *Tobin v. Symonds, et al.*, 2 Old. 141 (N.S.). The owner of a wrecked vessel is not bound to defray the return passage of the seamen. The transfer of the materials of a wrecked vessel by the master for that purpose held not to change the property in the goods: *Melancon v. Comeau*, James 373 (N.S.). The fact of a master being also a part owner does not affect his right to recover against the vessel for wages due him: *The Aura*, Y. A. D. 54 (N.S.). *The Bella Mudge*, Y. A. D. 222 (N.S.) Moral necessity is sufficient to justify a master in selling a shipwrecked vessel, and the existence of such necessity is a question of fact for the jury: *Orange et al v. McKay*, 1 Old. 444 (N.S.). Where the managing owner and the master of a ship order necessities for the ship on credit the owners are liable. The certifi-

cate of registry is presumptive evidence of the ownership. (See 4th R. S. c. 96, s. 31) : *Smith v. Fulton et al.*, R. & C. 225 (N.S.).

The master of a vessel is personally liable on a bill of exchange drawn by him upon the owners in payment of necessities ordered by him, for which he purports by the terms of the bill to hold his vessel, owners, and freight responsible. *The Ripon City*, 66 L. J. P. 110; (1897) P. 226, followed; *Ceylon Coal Co. v. Goodrich*, 73 L. J. P. 104; (1904) P. 319; 91 L. T. 151; 9 Asp. M. C. 606.

The registered owner of a ship who has supplied necessities for the ship, has a claim on the ship for repayment paramount to the right of purchasers to delivery of the ship: *Foong Tai v. Buchheister* (1908), A. C. 458. Master personally liable but given lien on ship: *The Cairo*, 99 L. T. 940. Goods were not supplied on the credit of the ship but were charged to charterers. Held, no lien for necessities could be asserted against the ship: *Upson-Walton Co. v. "Brian Boru,"* 11 Ex. C. R. 109.

The owner may lawfully stipulate for immunity from liability for thefts committed on board his ship, even by the captain or the crew. When the damage of which the shipper or consignor complains falls apparently within the scope of a stipulation against liability in the bill of lading, the plaintiff must prove some default on the part of the carrier personally to entitle him to recover: *Mathys v. Manchester Liners*, Q. R. 25 S. C. 426.

The signature of a bill of lading by the charterers instead of by the master is binding and sufficient: *Knutsford v. Tillmanns*, 77 L. J. K. B. 977; (1908) A. C. 406; 99 L. T. 399; 13 Com. Cas. 334; 24 T. L. R. 786.

At the time of loading there is an absolute warranty of the shipowner, who has agreed to take a particular cargo, that his ship is fit to receive the cargo, but this warranty is not a continuing warranty, and defaults occurring after the period of loading are not breaches of this warranty: *McFadden v. Blue Star Line*, 74 L. J. K. B. 423; (1905) 1 K. B. 697; 93 L. T. 52; 53 W. R. 576; 10 Com. Cas. 123; 10 Asp. M. C. 55; 21 T. L. R. 345.

A shipowner is entitled to limit his liability in respect of the loss of passengers' personal effects: *The Stella* (No. 1), 81 L. T. 235; 8 Asp. M. C. 605.

A contract to tow a vessel for a fixed sum from one place to another, the complete performance of which becomes impossible through no fault of either party, is an indivisible contract, and the owners of a tug rendering towage services under such contract are not entitled to be paid *pro rata*, or any sum for the towage actually performed: *The Madras*, 67 L. J. P. 53; (1898) P. 90; 78 L. T. 325; 8 Asp. M. C. 397.

The report by the master of a ship to her owner is not admissible as evidence against the owner of the facts contained in it: *The Solway* (54 L. J. P. 82; 10 P. D. 137), disapproved: *Admiralty Commissioners v. Aberdeen Steam Trawling Co.* (1909), S. C. 325.

The master of a vessel is personally liable on a bill of exchange drawn by him upon the owners in payment of necessities ordered by him, for which he purports by the terms of the bill to hold his vessel, owners, and freight responsible. *The Ripon City* (66 L. J. P. 110; (1897), P. 226), followed: *Ceylon Coaling Co. v. Goodrich*, 73 L. J. P. 104; (1904), P. 319; 91 L. T. 151.

It is sufficient to discharge the owner of a vessel conveying goods from port to port from liability for non-delivery, to shew that the goods were delivered by the master at the port to which they were consigned and notice given during the usual business hours to the consignee: *McKay v. Lockhart*, 4 O. S. 407.

ACTION ON GUARANTEE.

A guarantee is a contract to answer for the payment of a debt or performance of a duty by another person.

A contract of suretyship arises also by the law merchant between drawer and indorsee, and between indorser and subsequent holders.

A question often arises as to whether the guarantee is confined to one transaction and is at an end when credit has once been given to the amount guaranteed, or whether it continues in respect to credit given or debts contracted from time to time.

The tendency of the Courts is now to construe guarantees as continuing until revoked. It is generally a question of intention.

Plaintiff must prove default of principal debtor against which he has been guaranteed. Admissions made by principal debtor, or a judgment or award obtained against him by plaintiff, are not evidence against the surety.

A surety against whom judgment has been obtained by the principal debtor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability: *Wolmers Hansen v. Gullick* (1893), 2 Ch. 514.

DEFENCE.

By the Statute of Frauds, 29 Car. II., c. 3, s. 4; R. S. O. 1897, c. 334, s. 5, no action can be brought "upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party

to be charged therewith, or some other person thereunto by him lawfully authorized."

By R. S. O. 1897, c. 146, s. 8, the consideration need not appear in writing.

It is simply a promise to pay the debt of another which is valid enough as far as the consideration is concerned but is not enforceable because not put into writing: *Chater v. Beckett*, 7 I. R. 201; *Beattie v. Dinajek*, 27 O. R. 285; *Harbawa Indian Rubber Co. v. Martin* (1902), 1 K. B. 778; *Bailey v. Gillies*, 4 O. L. R. 182, 190; *Young v. Milne*, 1 O. W. N. 460.

Giving a guarantee for a fixed amount does not prevent the incurring of a debt beyond that unless the contrary is clearly expressed: *Woods v. Cobalt*, 12 O. W. R. 1135.

A continuing guaranty under seal, where the consideration is given once for all, it is not determined by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guaranty is given. Such a guaranty cannot be determined by the guarantor or his executors upon notice, unless there by an expressed stipulation to that effect: *Crace, In re; Balfour v. Crace*, 71 L. J. Ch. 358; (1902), 1 Ch. 733; 86 L. T. 144.

Liability of estate of guarantor considered: *Union Bank of Canada v. Clark*, 12 O. W. R. 582.

In construing correspondence which it is alleged contains a guarantee and which is ambiguous the same principles of construction apply as prevail in any other contract, and the documents should be construed so as not to render the act of the parties void: *Laird v. Adams*, 7 W. L. R. 881.

As a written memorandum of an oral guarantee is required only for the purpose of evidence, a letter or other writing subsequently given by the guarantor, sufficiently shewing the terms of his undertaking, will suffice. A letter shewing the terms written by the guarantor partly on his own behalf, and partly on behalf of a firm of debtors, and signed by him in the firm name and in his own name for them per proc., is sufficient to bind him: *Thomson v. Eede*, 22 A. R. 105.

A promise made by a third person to a creditor to pay or to see paid the debt due to him by his debtor, whether such promise is absolute or conditional, is the promise to answer for the debt of another, and is within s. 4 of the Statute of Frauds. The plaintiff was the holder of a promissory note of an incorporated company, of which the defendant was president, and was pressing for payment

* For Fidelity Bonds, see under Contract of Insurance Employers' Liability Policies.

when the defendant orally promised to see him paid if he would forbear to sue, and would renew: Held, that this was not a promise of indemnity, but of guarantee, and therefore required by s. 4 of the Statute of Frauds to be in writing. *Guild & Co. v. Conrad*, 1894, 2 Q. B. 885, distinguished: *Beattie v. Dinnick*, 27 O. R. 285.

Where a creditor gives his debtor an extension of time for payment, a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given: *Wyke v. Rogers*, 1 DeG. M. & G. 408, followed: *Gorman v. Dixon*, 26 S. C. R. 87.

The plaintiff having sued one of two contractors, the other being out of the jurisdiction, and having recovered judgment against him, cannot afterwards sue the other: *Harris v. Dunn*, 18 U. C. R. 352.

The surety may rely on the concealment of material particulars by the principal at the time the contract was made. On the other hand, the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety: Non-disclosure—what amounts to, discussed: *Meaford v. Lang*, 20 O. R. 541. Any alteration by a binding agreement in the relative position of the creditor and principal debtor, whereby the latter is released, or the remedy against him is suspended, or the risk of the surety varied without the surety's assent, will be a discharge of the guarantee: *Crathern v. Bell*, 45 U. C. R. 473; *Richard v. Stillwell*, 8 O. R. 511. On the effect of a creditor releasing some of his security: *Molson Bank v. Heilig*, 26 O. R. 276. When a creditor wastes or deals improperly with a security the surety is discharged, but only *pro tanto*: *Ward v. National Bank of New Zealand*, 8 App. Cas. 766; *Taylor v. Bank of New South Wales*, 11 App. Cas. 602; see a complete release, *Allison v. McDonald*, 20 A. R. 695. A bond conditioned for delivery up by the principal on demand requires a personal demand; a demand on his personal representatives is insufficient: *Port Elgin v. Eby*, 26 O. R. 73. A new agreement between the debtor and creditor, extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract and releases the surety. A provision reserving the rights of the surety is of no avail as regards the stipulation for an increased rate of interest: *Bristol, etc. v. Taylor*, 24 O. R. 286. Where one of several sureties has been released by the creditor giving time to the principal debtor with the consent of one of the sureties, the latter cannot upon payment of the debt recover contribution from the co-surety: *Worthington v. Peck*, 24 O. R. 535. Change of official duties: *Middlesex v. Smallman*, 20 O. R. 487. A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration

of the original contract and releases the surety. And a provision in such agreement reserving the rights of the creditor against the surety though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and notwithstanding such reservation the surety is discharged: *Bristol and West of England Land Co. v. Taylor*, 24 Q. R. 286. In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute. Held, affirming the judgment appealed from (19 N. S. Rep. 96) that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration alleged to be in the attestation clause could not succeed. Held, also, that the objection as to the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this Court: *Woodworth v. Dickie*, 14 S. C. R. 734. Where certain securities have been assigned as collateral security for the payment of a promissory note of \$1,000, which note has been partly paid and a new note given, such securities may be held until the debt is discharged by payment: *Wiley v. Medyard*, 10 P. R. 182. A person who is surety for another and holds collateral securities is not bound to wait until he has paid the debt of the principal before he assigns such securities, but may do so at any time to the creditor in discharge of his liability: *Paton v. Wilkes*, 8 Gr. 252. A creditor may by express reservation preserve his rights against a surety notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety: *Holliday v. Hogan*, 20 A. R. 298. Where an alteration is made in the contract of suretyship, then, unless it is without injury, self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not go into an enquiry or permit the question to be submitted to the jury, but will hold that the surety must be the sole judge as to whether he will remain liable notwithstanding the alteration: *Citizens' Ins. Co. v. Cluxton*, 13 O. R. 382. A guarantee should be construed as all other contracts not strictly as against either side, but by collecting the real intention of the parties from the instrument and the surrounding circumstances, taking the words in their ordinary sense unless by the known usage of trade they have acquired a peculiar meaning: *Kastner v. Winstanley*, 20 U. C. C. P. 101. A guarantee that a promissory note made by another will be paid at maturity is within section 4 of the statute, and therefore invalid unless in writing: *Wambold v. Foote*, 2 A. R. 579. Where the engagement of a surety is a contract and not a bare authority it is not usually revoked by his death, and his estate remains liable to the same

extent as he would have been if he had lived: *Exchange Bank of Canada v. Springer*, *Exchange Bank of Canada v. Burns*, 7 O. R. 309, 13 A. R. 390. See S. C., 14 S. C. R. 716. A., the holder of a bond made by B., C. and D., the latter being sureties for B., when an instalment on the bond became due without the knowledge of C. and D., took B.'s notes to himself, which he indorsed and discounted at a bank applying the proceeds upon the instalment and interest. Upon maturity of the notes he retired them, and brought this action on the bond. Upon an equitable plea: Held, that the sureties were discharged, and a verdict having been found against them a new trial was granted: *Hooker v. Gamble*, 13 U. C. C. P. 462. A person about to become surety for another should be informed of all circumstances which may affect his suretyship, and if they are intentionally concealed by the party for whose benefit the security is given, the surety may have the bond delivered up to be cancelled: *Cashin v. Perth*, 7 Gr. 340. A surety cannot get rid of his liability on the ground of having become surety in ignorance of material facts unless he can shew that information was fraudulently withheld from him: *Township of East Zorra v. Douglas*, 17 Gr. 462. A covenant not to sue entered into by a creditor with the principal debtor, without the surety's consent, but reserving all remedies by the creditor against others, does not discharge such surety. An assignment by the principal for the benefit of creditors generally, which contains a clause reserving all rights and remedies against third parties, but releasing the assignor from his liability, operates only as a covenant not to sue, and not as a release: *Hall v. Thompson*, 9 U. C. C. P. 257. The acceptance by a creditor of part of his demand against his debtor and agreeing not to sue him, with a reservation of the creditor's rights against a surety of such debtor, will not discharge the surety. Where, therefore, the holders of a bill received from the acceptor a composition of the debt, and executed a deed to that effect, but expressly reserved their rights against the drawer: Held, that the drawer was not discharged: *Wood v. Brett*, 9 Gr. 452. Where a creditor gives his debtor an extension of time for payment, a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given: *Wyke v. Rogers*, 1 DeG. M. & G. 408, followed: *Gorman v. Dixon*, 26 S. C. R. 87. The executors of sureties are liable for the defalcation of the principal, committed after the death of their testator, and even after notice given by the executors that they would not be liable: *The Queen v. Deeming*, 7 U. C. R. 306. The rule that general payments are appropriated first to the earliest items on the other side of an account does not entitle a surety to claim that a concealed item which from its not being known the debtor had not been charged with, should be deemed to have been satisfied by the moneys, which had from time to time been paid by the debtor, and

which had, when so paid, been charged by both parties against the other sums received by the debtor on behalf of the creditor: *County of Prontene v. Breder*, 17 Gr. 645. Held, that the books of the agent or clerk of a public company during his lifetime are not good evidence against his surety sued on his bond for a deficiency in the agent's accounts: *Ferrie v. Jones*, 8 U. C. R. 192. In an action against a clerk of the Division Court for moneys received for bailiff's fees, entries made by such clerk in the course of his business in books kept under the provision of an Act for that purpose: Held, evidence against the sureties: *Middlefield v. Gould*, 10 U. C. C. P. 9. A surety holding collateral securities is not bound to wait until he has paid the debt before he assigns such securities, but may do so at any time to the creditor in discharge of his liability: *Paton v. Wilkes*, 8 Gr. 252. A surety paying the debt of his principal after arrangements made between the creditor and the principal, which would have had the effect of discharging the surety, cannot recover the money so paid: *Geary v. Gore Bank*, 8 Gr. 536. The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt, and if assigned to a person entitled to recover the debt it gives the assignee a direct right of action against the person liable to pay the same. Affirming *Campbell v. Morrison*, 24 A. R. 224: *Maloney v. Campbell*, 28 S. C. R. 228.

ACTION ON WARRANTY.

The most frequent cases in which an action is brought on a warranty are on the occasion of a sale of goods, and of a representation of authority to enter into a contract on behalf of another person.

Warranty on Sale of Chattels.

If a man sells goods affirming them to be his own, that amounts to a warranty of title. There is in general no implied warranty of title any more than of quality on the bare sale of a personal chattel: *Morley v. Attenborough*, 3 Ex. 500. But see *Peuchen v. Imperial Bank*, 20 O. R. 335.

In order to make a seller of personal property liable for a bad title there must be shewn fraud, or express warranty, or an equivalent to it by declaration, or conduct, or usage of trade: *Bagueley v. Hawley*, L. R. 2 C. P. 625.

As to warranty of quality, the following classes of sales shew in what cases there is an implied warranty of quality: 1. Where the goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent and not discoverable on examination, at

least where the seller is neither the grower nor manufacturer: *Parkinson v. Lee*, 2 East 314. 2. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which may be ascertained by either party, there is no implied warranty: *Barr v. Gibson*, 3 M. & W. 390. 3. Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no purpose, so that the buyer necessarily trusts to the judgment or warranty that it shall answer the particular purpose intended by the buyer: *Chanter v. Hopkins*, 4 M. & W. 399. 4. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown v. Edgington*, 2 M. & Gr. 279. 5. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing v. Fidgeon*, 4 Camp. 169. 6. Where the contract is to supply goods of a specified description, which the buyer has had no opportunity of inspecting, the goods must not only in fact answer the specific description, but must also be merchantable or saleable under that description: *Bigge v. Parkinson*, 7 H. & N. 955. And, even although the buyer has inspected the bulk, the goods must answer the specified description: *Josling v. Kingsford*, 13 C. B., N. S. 447.

When the purchaser of a chattel bought with a warranty keeps it for a considerable time and makes a payment on account, the contract must be treated as executed, and any representation or condition as to the quality of the goods must then be regarded as a warranty for the breach of which compensation must be sought in damages and not by rescission of the contract: *McKenzie v. McMullen*, 3 W. L. R. 460, 16 Man. L. R. 11. See *Thompson v. Cameron*, 2 E. L. R. 192, 41 N. S. R. 29; *Wright v. Ross*, 9 O. W. R. 618.

The lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let: *Reynolds v. Roxburgh*, 10 O. R. 649.

The general rule is that whatever the vendor represents at the time of the sale of a horse is a warranty, but often there must be discrimination between language merely of expectation, estimate or praise, and that which constitutes a representation or warranty, and the attention of the jury should be called to this distinction, in pointed language: *Irvine v. Parker*, 40 N. S. R. 392.

Where a horse or other article has been sold warranted, but is not in fact according to the warranty, the purchaser may maintain an action upon the warranty. In some cases he may rescind the contract and recover the money paid. It is only where there is a condition in the contract authorizing the return of the chattel, or where the vendor has received it back and thereby rescinded the contract, or has been guilty of a fraud which avoids the contract, that the purchaser may thus recover back the price. Where the property has not passed an action for breach of warranty will not lie: *Frye v. Milligan*, 10 O. R. 599; *Tomlinson v. Morris*, 12 O. R. 311.

Where there is a breach of the warranty and no condition for rescinding the sale, the vendee must keep the article and rely upon a cross action or counterclaim, or prove the breach in reduction of damages when sued for the price: *Moore v. Gooderham & Worts*, 14 O. R. 451. See also *Ellis v. Abell*, 10 A. R. 226.

Where there is no written contract and the warranty is mentioned in the receipt for purchase money, the sale and warranty may be proved by production of receipt. A sale for \$40 and upwards is within the Statute of Frauds; but as breach of warranty is not usually discovered till after delivery and acceptance of goods sold, that statute is then complied with, and contract may be proved by oral evidence. The plaintiff must, in general, prove an express warranty. Generally, a representation made at the sale is part of the contract and equal to a warranty. Not if the contract is reduced to writing.

The plaintiff must prove unsoundness at time of sale: *Eaves v. Dixon*, 2 Taunt. 343.

If a horse has been returned, the plaintiff will be entitled to recover whole price: if kept, difference between real value and price. Or, plaintiff may sell horse for what he can get, and recover residue of price paid in damages: *Caswell v. Coare*, 1 Taunt. 566.

Warranty by agent: *McMullen v. Williams*, 5 A. R. 518.

The plaintiff purchased an orchid from the defendant at an auction for twenty guineas with the warranty that it was "*Cattleya Acklandiæ alba*, only known plant." After two years it flowered, and produced not a white but a purple flower. The value of such a plant is 7s. 6d. In an action for breach of warranty the County Court Judge found as a fact that if the orchid had been an actual alba, it was at the time of sale worth £50; but until it shewed its real nature there was no probability that an orchid grower would give more than twenty guineas for it: Held, upon this finding, that judgment must be entered for the plaintiff for £50: *Ashworth v. Wells*, 75 L. T. 226.

The purchaser of goods subject to a latent defect, sold with a warranty, is not estopped from claiming for breach of warranty, when sued for the price, by having received goods without objection made at the time: *Smith v. Archibald*, 41 N. S. R. 211.

An affirmation made upon the sale or letting of real property as to the then state of the property may amount to a warranty, provided the like conditions exist as in the case of a warranty upon the sale of a chattel: *De Lassalle v. Guildford*, 70 L. J. K. B. 533; (1901), 2 K. B. 215; 84 L. T. 549; 49 W. R. 467.

The measure of damages is the difference between the value of the article actually sent to the foreign market, and the value of an article of the quality specified in the bought-note: *Weir v. Bissett*, 2 Thom. 178 (N.S.). The measure of damages is the sum which at the time of the sale it would have been necessary to expend in order to remove any defect which constituted a breach of the warranty: *Cook v. Thomas*, 4 M. L. R. 286 (Man.). A contract amounting to a warranty of goods sold is violated if the articles owing to a secret defect existing at the time of sale afterwards became deteriorated in value: *Hardy, et al. v. Fairbanks, et al.*, James, 432 (N.S.).

In an action for breach of warranty of title it is necessary to prove at the trial that the title was not as warranted: *Koester v. Hamilton Provident Society*, 10 M. L. R. 374 (Man.). Under a written contract for the sale by description of a specific article, namely, a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence is not admissible to shew a warranty made prior to the entering of the contract which is inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or subtract from the written contract, and statements alleged to have been made by the vendors and acted on by the purchaser to the effect that the engine would pump sufficient water for a certain number of horses and cattle were not such as to constitute a separate and independent collateral agreement and admissible in evidence as such: *Northey Mfg. Co. v. Sanders*, 31 O. R. 475. The breach of warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and it forms no defence to an action by the seller for the price, but the purchaser on being sued for the price is allowed to give evidence of the breach of warranty in reduction of damages: *Mooers v. Gooderham*, 14 O. R. 451. A person manufacturing an article, in his own particular line (such as a portable threshing machine), must be taken impliedly to warrant that the article shall be made in a proper and workmanlike manner and be fit for doing what was expected of it: *Grant v. Cadwell*, 8 U. C. R. 161.

where an article is supplied for a particular purpose—such as in this case, a furnace to heat the plaintiff's office, and the vendor is to put it up for that object, there is an implied warranty that it will answer: Held, that there was nothing in the defendant's written tender set out in the case to exclude the implied warranty, and that the evidence supported a verdict for the plaintiffs: *Bigelow v. Bozall*, 38 U. C. R. 452. The plaintiff agreed to sell to defendant certain timber, which he was about to cut, on land of which he was in occupation. He cut and delivered it at the place agreed on, but the government had a claim upon it for timber dues: Held, although there was no express warranty of title, that there being an executory contract for purchase and sale of a subject, unascertained and afterwards to be conveyed, the purchaser had the right to insist upon a good title; and that in an action for not accepting he might deduct the amount of dues for which the Crown had a lien. *Semble*, however, that in all cases of the sale of chattels, the vendor, by selling them as his own, impliedly warrants the title unless the facts shew that he intended only to transfer his interest: *Brown v. Cockburn*, 37 U. C. R. 592. A warranty made after sale without a new consideration is not binding: *Grant v. Cadwell*, 8 U. C. R. 161.

Warranty of Authority.

In the case of the second kind of action on warranty, viz., *action on the occasion of a representation of authority* to enter into a contract on behalf of another person, the general principle applies that where A. contracts for B., as agent, he is liable if he is really principal, or if there is no B. in existence. If A. *bona fide* but falsely represent to plaintiff that he is authorized by B. to order goods, and plaintiff fail in action against B. for want of such authority, he may recover value and costs of former action in an action against A.: *Randell v. Trimer*, 25 L. J. C. P. 307.

In order to enable a plaintiff to maintain an action for damages against a defendant who has purported to sign a contract on behalf of an alleged principal, the plaintiff must prove a representation by the defendant that he was so to sign when in fact he was not authorized, and that such misrepresentation was believed: *Collen v. Wright* (27 L. J. Q. B. 215; 8 E. & B. 647) must be considered as being overruled. *Smout v. Ilbery* (12 L. J. Ex. 357; 10 M. & W. 1). *Halbot v. Lens*, 70 L. J. Ch. 125; (1901), 1 Ch. 344; 83 L. T. 702; 49 W. R. 214.

ACTION ON PROMISE OF MARRIAGE.

To maintain this action the plaintiff must prove the contract and promise of the defendant. The promises must be mutual, the reciprocity constituting the consideration.

To prove the breach of the promise, evidence must be given either that the defendant has married another person, so that performance is no longer possible, or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant.

The financial position of the defendant is evidence on the question of damages, and not merely the loss of an establishment in life, but the injury to the plaintiff's feelings may be considered by the jury; and in this respect the measure of damages is different from that which is adopted in the case of other contracts. As to evidence of parties in this action, see the Ontario Evidence Act (1909), c. 43, s. 11, page ante: *McLaughlin v. Moore*, 10 P. R. 326. As to corroborative evidence, see *Costello v. Hunter*, 12 O. R. 333; *Yarwood v. Hart*, 16 O. R. 23; *Smith v. Jamieson*, 17 O. R. 626. Where defendant sets up general immodesty, plaintiff may, in first instance, give general evidence of good character, but not if there is a specific charge of immoral acts: *Jones v. James*, 18 L. T. N. S. 243.

DEFENCE.

Immodesty or depraved conduct subsequently discovered: *Grant v. Cornock*, 16 A. R. 532. To shew general bad character of plaintiff, evidence of general reputation is admissible: *Foulkes v. Sellway*, 3 Esp. 236. Material misrepresentation of circumstances. Release by conduct: *Reynolds v. Jamieson*, 19 O. R. 235.

ACTION FOR DOWER.

In Ontario, the present Act relating to dower is chap. 39 of the Statutes passed in 1909. Section 19 states that no action of dower shall lie where the dowress has joined in a deed to convey the land or to release her dower therein, though there may have been informality as to the acknowledgment of the deed.

In British Columbia the Act respecting dower is B. C. R. S. 1897, c. 63.

In New Brunswick, c. 77, C. S. 1903.

In Nova Scotia, c. 114, R. S. N. S. 1900, cc. 114 and 169.

No arrears of dower are recoverable for more than six years before the commencement of an action to recover them. No action of dower can be brought but within ten years of the death of the husband of the dowress. And where the dowress has, after the death of her husband, actual possession of the land of which she is dowerable, either alone or with heirs or devisees of her husband; the period of ten years must be computed from the time that her possession as dowress ceased. (See Ont. Stats. 1910, c. 34, secs. 26-28.)

Held, that under Statute 13 Edw. I. c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted *bona fide*, believing on reasonable grounds that she was legally entitled to marry again: *Phillips v. Phillips*, 4 N. B. Eq. 115, 6 E. L. R. 478. See *Aolan v. McAdam*, 39 N. S. R. 380, as to law in Nova Scotia. Absence from province for over twenty years, widow's action barred: *Re Foster and Knapton*, 13 O. W. R. 176, 507.

An action for assignment of dower is not within the Real Property Limitation Acts (imp.) 1833 and 1874, but if the dowress does not for more than twelve years claim any of her rights as a dowress the Court may refuse to give her relief on the ground of *laches*. *Marshall v. Smith*, 5 Giff. 37, approved on ground of *laches* only overruled so far as based on Statute of Limitations: *Williams v. Thomas* (1909), 1 Ch. 713.

A dowress has a right to one-third of the rents and profits from her husband's death, and a right to have dower assigned to her, the first right being in no way dependent upon the second. A dowress, therefore, who has claimed and enjoyed the receipt from the heir of one-third of the rents and profits ought not to be prejudiced by reason of her not having, during that period, claimed her right to an assignment: *Williams v. Thomas*, *ut sup.*

Forrest v. Laycock, 18 Chy. 61, is conclusive that where a wife in good faith claims to be entitled to dower and refuses to join in the conveyance without a reasonable compensation being made to her, the payment made to her by the purchaser to induce her so to join in the conveyance is valid against the creditors of the husband: *McDonald v. Curran*, 1 O. W. N. 389.

Where lands mortgaged to acquire a loan have been sold by the mortgagee, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus, computed on what would be the full value of the land if unincumbered. *Pratt v. Bunnell*, 21 O. R. 1, not followed (so far as the reasoning and dicta therein are opposed to the above decision): *Gemmell v. Nelligan*, 26 O. R. 307.

Widow can claim dower only in the event of redemption, unless she contributes ratably to the amount of the mortgage incumbrance. The method of arriving at the amount of dower in such cases pointed out: *Dobbin v. Dobbin*, 11 O. R. 534.

A sale of land for taxes destroys the right of the widow of the owner to dower: *Tomlinson v. Hill*, 5 Chy. 231.

The dower of the wife is not barred by the sale in execution of her husband's estate: *Walker v. Powers*, M. T. 4 Vict.

Where the husband is seized as tenant in common, his wife may be endowed: *Ham v. Ham*, 14 U. C. R. 497.

A widow is entitled to dower in lands purchased from the Crown by her husband and whereof he died possessed, although no patent issued, and the purchase money had not been all paid. She is also entitled to one-third of the rents and profits for six years before the suit: *Craig v. Templeton*, 8 Chy. 483.

Where a party agrees to convey property he is bound to do so free from dower; or if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money: *Kendrew v. Shewan*, 4 Chy. 578.

A wife cannot be endowed of land given and taken in exchange, but has her election to have one or the other: *McLellan v. Meggatt*, 7 U. C. R. 554.

Wife or widow of mortgagee not entitled to dower: *Ham v. Ham*, 14 U. C. R. 497.

Where the annual value of a widow's dower was not large, and she made no demand for it, but resided on the property with her son, the heir, during his life, having no intention of claiming dower, a claim for arrears against his estate after his death was refused: *Phillips v. Zimmerman*, 18 Chy. 224.

The mere fact that at the death of or alienation by the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or vendee, as in such a case a portion of the rent is attributable to the land: *Wallace v. Moore*, 18 Chy. 560.

Held, that the presumption of death arising from continued absence of the defendant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living: *Giles v. Morrow*, 1 O. R. 527.

Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and, by consent of the widow, freed from her dower, upon the footing that she was to get out of the proceeds of the sale a sum in gross in lieu of dower. The estate was practically insolvent, and but little was left for the sustenance of the widow and children: Held, that notwithstanding the opposition of creditors, the widow should be allowed a gross sum: *Re Rose*, 17 P. R. 136.

A wife's conveyance of her equitable estate is valid without the husband joining in the conveyance; and the husband having the legal title vested in him, the wife's vendee was held entitled to a decree against the husband for a conveyance: *Adams v. Loomis*, 22 Chy. 99.

ACTION ON AN AWARD.

In Ontario the present Act relating to arbitrations and awards is chapter 35 of the statutes passed in 1909; Alberta, 1909, chapter 6; British Columbia, R. S. 1897, chapter 9; Manitoba, R. S. 1891, chap-

ter 1; Nova Scotia, R. S. 1900, c. 176; Trade Disputes, Ont. R. S. 1897, c. 158; 1902, c. 22.

An action on an award is the only way of enforcing it where the submission cannot be made a rule of Court, *e.g.*, parol.

The Court has jurisdiction over awards whether or not they are awards to which the provisions of 9 & 10 W. III. c. 15 apply. *Smith v. Whitmore*, 2 DeG J. & S. 297, followed: *Johannesson v. Galbraith*, 3 W. L. R. 275, 16 Man. L. R. 138.

Plaintiff must prove submission and award, and performance by himself of any conditions precedent put in issue. Where submission is by a Judge's order, which has been made an order of Court, it is sufficiently proved by production of office copy of latter order, but not where submission is by deed or written agreement. **It is necessary to prove the submission of all parties to arbitration, for without such proof it does not appear that the arbitrator had competent authority to decide between the parties.** If time for making award has been enlarged, and award made within enlarged time, plaintiff must show that enlargement was duly made according to terms of submission, or by consent or under power of statute. If the award be by an umpire, or by the arbitrators and an umpire, the appointment of the latter must be proved: *Still v. Halford*, 4 Campbell 19. Unless the submission requires it, attestation is unnecessary; and **in general, therefore, an award may be proved like any other deed or writing, namely, by proof of the arbitrators' handwriting.**

DEFENCE.

Corruption or misconduct of the arbitrators is not matter of defence, at least where application might have been successfully made to the Court to set the award aside. Nor can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake: *Johnson v. Durant*, 2 B. & A. 925; see *Moore v. Buckner*, 28 Chy. 606. Suing on an award will estop a party from denying the authority of the arbitrators: *Black v. Allen*, 17 U. C. C. P. 240. "Publication" of an award signifying its completion so far as the arbitrator is concerned is made when he executes it in the presence of a witness, or does any other act shewing his final mind upon which he becomes *functus officio*; and when an award is thus completed an action may be brought upon it forthwith, though the defendant has the right to move against it within the proper time after "publication" to the parties; and a motion by the defendant to set aside the award may go on concurrently with an action to enforce it. *Moore v. Buckner*, 28 Chy. 606 (mentioned *supra*), not followed. Interest upon the amount of an award does not begin to run until notice of the award has been given to the defendant:

Huyck v. Wilson, 18 P. R. 44. An award may be remitted to arbitrators for re-consideration and re-determination under the Ontario Statute, though the result of the re-consideration may be to have the award virtually set aside by a different or even contrary decision of the arbitrators. The Court is justified in remitting an award to the arbitrators, if fraud or fraudulent concealment on the part of the persons in whose favour it is made is established, or if new evidence is discovered which by the exercise of a reasonable diligence could not have been discovered before the award was made: *Green v. Citizen's Ins. Co.*, 18 S. C. R. 338. An award in expropriation proceedings under the Railway Act, R. S. C. c. 109, where the arbitrators acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice, should not be interfered with. Judgment appealed from (M. L. R. 6 Q. B. 385) affirmed: *Benning v. Atlantic & N. W. Ry. Co.*, 20 S. C. R. 177. *Semble*, that the award was not admitted by the pleadings in this case; but, held, that it was sufficiently proved by shewing that the defendants paid a portion of the sum awarded, and that their officers had stated in writing the particulars of the award and the sum remaining due on it: *Hughes v. Mutual Fire Ins. Co. of District of Newcastle*, 98 U. C. R. 387.

Admission of irrelevant evidence by the arbitrators, if not shewn to have affected amount of award, is no ground of appeal therefrom: *Q. M. & S. Ry. Co. v. Landry*, 19 Q. K. B. 82. Arbitrators having taken evidence of custom which was proved not to exist, award set aside: *N. W. Rubber Co. v. Huttenbach* (1908), 2 K. B. 907. Arbitrators having acted *separatim* in making their award, an objection to a finding so made is fatal: *McLeod v. Hope & Farmer*, 14 B. C. R. 56; *Re McLeod and Hope*, 9 W. L. R. 315.

ACTION ON SOLICITOR'S BILL.

Acts respecting legal profession:—Alberta, 1907, c. 20; 1908, c. 20, sec. 29. British Columbia, R. S. 1897, c. 24; 1898, c. 8; 1899, c. 3; 1901, c. 4; 1902, c. 3. Manitoba, 1888, c. 17 and 29; 1889, c. 26; 1890, c. 2. New Brunswick, C. S. 1903, c. 68. Nova Scotia, R. S. 1900, c. 164; 1901, c. 15, s. 8, c. 50.

See R. S. O., 1897, c. 174, s. 31.

As to special circumstances, see s. 34.

Payment not to preclude taxation, etc., see s. 49.

Plaintiff must prove

1. His retainer as solicitor by the defendant, which may be done either by showing an express retainer, or that the defendant

attended at his office and gave directions, or in other ways recognized his employment. See *Re Allison*, 12 P. R. 6. **2. That business was done**, which may be proved by clerk or other agent who can speak of the existence of the cause or the business in respect of which the charges were made, and can prove the main items.

In an action against an ordinary corporation a retainer under seal must be proved, but not in the case of commercial companies incorporated by Act of Parliament. Now an agreement may be made for payment by a gross sum: Ontario Statutes, 1909, c. 28, sections 22 to 41.

3. Delivery of bill, at least one calendar month before commencement of action. See *Scane v. Duckett*, 2 O. R. 370. **The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered.** It is enough to prove that a bill of fees, subscribed or enclosed in a signed letter, was duly delivered, and the defendant may show that it was not a *bona fide* compliance with the Act.

The time within which a client must assert his right as against his solicitor to obtain or in the case of error, to open an account, is not limited to six years or to any other definite period. *Hindmarsh, In re* (1 Dr. & S. 129) and *Mainland v. Upjohn*, 58 L. J. Ch. 361; 41 Ch. D. 126 distinguished: *Cheese v. Keen*, 77 L. J. Ch. 163; (1908) 1 Ch. 245.

DEFENCE.

Special defences are: Non-delivery of bill, disputed charges, negligence or misconduct of plaintiff, want of certificate, admission, etc., Statute of Limitations.

See R. S. O. 1897, c. 147, ss. 2, 24, 27 and 28.

It is only after expiration of a year that the reference to taxation at request of party chargeable is not grantable of course.

As to agency business, if the solicitor ordering it does not expressly say he does not intend to be personally liable, he becomes personally liable.

ACTION AGAINST SOLICITOR FOR NEGLIGENCE.

In general, a solicitor is liable for ignorance or non-observance of rules of practice; for want of care in preparation of cause for trial, or of attendance thereon with his witnesses; for mismanagement of case so far as so much of the conduct as is usually allotted to solicitors.

He is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually

entrusted to counsel: *Godfroy v. Dalton*, 6 Bing. 467. See *O'Donohue v. Whitty*, 2 O. R. 624. Action is maintainable, though damages be only nominal: *Godfrey v. Fay*, 7 Bing. 413. A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment, and thereby precluding the client from recovering the amount of his judgment debt: *Hett v. Pim Pong*, 18 S. C. R. 290. An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which would be recovered, is champertous and void: *O'Connor v. Gemmill*, 29 O. R. 47, 26 A. R. 27. See *Williams v. McDougall*, 12 W. L. R. 381. But see page 267, *ante*.

DEFENCE.

Statute of Limitations runs from breach of duty complained of.

The client having insisted that an arrest be made after being advised by solicitor that it would be irregular and illegal failed in action against the solicitor: *Kenen v. Hill*, 38 N. B. R. 342, 4 E. L. R. 180.

A solicitor who advises his client according to the established jurisprudence is not guilty of actionable negligence if the decision upon which he relies is over-ruled: *Taylor v. Robertson*, 31 S. C. R. 615.

ACTIONS BY MEDICAL PRACTITIONERS.

The Statutes relating to the Medical Profession are as follows:
Alberta, 1906, c. 28.

British Columbia, 1898, c. 9; 1899, c. 4; 1903, c. 4; 1904, c. 4; 1905, c. 6.

Manitoba, R. S. 1902, c. 111; 1903, c. 23; 1906, c. 43.

New Brunswick, C. S. 1903, c. 73.

Nova Scotia, R. S. 1900, c. 103; 1903, c. 63; 1906, c. 21.

Ontario, R. S. 1897, c. 176; 1902, c. 12, s. 21; 1906, c. 24.

Saskatchewan, 1906, c. 28.

By R. S. O., 1897, c. 176, s. 40, every person registered under that Act shall be entitled, according to his qualification or qualifications, to practice medicine, surgery, or midwifery, or any of them, as the case may be, in the Province of Ontario, and to demand and recover in any Court, with full costs of suit, reasonable charges for professional aid, advice and visits, and the costs of any medicine or other medical or surgical appliances rendered or supplied by him to his patients.

By section 41 of this Act no duly registered member of the College of Physicians and Surgeons of Ontario shall be liable to any action for negligence or malpractice, by reason of professional services

requested or rendered, unless such action be commenced within one year from the date when, in the matter complained of, such professional services terminated.

It is now the general rule, as recognized in *Town v. Archer*, 4 O. L. R. 383, that actions against physicians or surgeons for malpractice, where the facts are not so much in dispute as the deductions of skilled witnesses upon the method of treatment disclosed, shall be tried without a jury: *Hodgins v. Banting*, 12 O. L. R. 117. Services, *quantum meruit*: *Gibson v. Mackay*, 10 O. W. R. 1081.

DEFENCE.

If the defendant has received no benefit on account of the plaintiff's want of skill, the latter cannot recover: *Kannen v. M'Mullen*, Peake 59; *Stamper v. Rhindress*, 41 N. S. R. 45. Procedure under Act against offending medical practitioner: *Re Washington*, 23 O. R. 299.

The contract of the governors of a public hospital with a patient undergoing a surgical operation or examination is only to supply a competent hospital staff and nurses with proper apparatus and appliances. Unless it is shewn that they have failed in that duty they are not responsible for injury caused to the patient by the negligence of the hospital staff or nurses in the course of such operation or examination: *Hillyer v. St. Bartholemew's Hospital* (1909), 2 K. B. 820.

ACTIONS FOR WAGES AND WRONGFUL DISMISSAL.

The Statutes relating to Masters and Servants are:

British Columbia, R. S. 1897, c. 131; 1898, c. 31; 1899, c. 43; 1902, c. 44.

Manitoba, R. S. 1902, c. 108; 1906, c. 42.

Nova Scotia, R. S. 1900, c. 117.

Ontario, 1910, c. 73—Wages—1910, c. 72.

Sask., 1907, c. 32.

In an action by servant for wages, **plaintiff must prove a hiring**, of which service will be evidence, **the length of time of service, and the amount of wages due.**

A dismissed servant may, and, if he can, ought to, enter into another service.

DEFENCE.

Misconduct, previous recovery of damages in action for wrongful dismissal.

If good cause for dismissal exists, it is immaterial that at the time of dismissal the master did not act or rely upon it, nor did not

know of it, and acted upon some other cause in itself insufficient; *McIntyre v. Hockin*, 16 A. R. 498.

In order that an employee may be discharged without notice, his conduct must be such as to cause a prejudice to his employer, or to give the latter reasonable cause to fear that he will suffer a prejudice by reason of the acts of the former: *Millan v. Dominion Carpet Co.*, Q. R. 22 S. C. 234.

Occupation of house as compensation for services: *Coulter v. Coulter*, 4 O. W. R. 65.

In estimating the damages due to the servant for breach of the contract of hiring, when the action is begun before the expiration of the period of the engagement, the Court must take into account the possibility of death, of incapacity to render the services contracted for, and of another engagement to render the same services which may be obtained before the end of such period: *Gregoire v. St. Charles de Bellechasse School Commissioners*, Q. R. 29 S. C. 215.

Indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment: *Addis v. Gramophone Co.* (1909), A. C. 488.

Where services are performed by a relative or other person upon a mere reliance that the party serving will share his bounty under his will, such services will not support an action as upon an implied assumpsit to pay in money: *Whyatt v. Marsh*, 4 U. C. R. 485.

The presumption against an implied right to remuneration for services rendered by near relatives arises only when the persons rendering the services, and those to whom they are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may in the case of near relatives be negatived on very slight grounds. The Court held on the facts on this case that the plaintiff, a married woman, who left her own home to nurse her sister, was not entitled to remuneration for her services: *Mooney v. Grout*, 6 O. L. R. 521. A son working at home upon his father's place would not be entitled to recover for work and labour in the absence of an agreement to that effect: *Campbell v. McKerricher*, 6 O. R. 85. Where brothers or sisters or other near relatives live together as a family, no promise arises by implication to pay for the services rendered or benefits which, as between strangers, would afford evidence of such a promise. *Redmond v. Redmond*, 27 U. C. R. 220, followed and approved of: *Iler v. Iler*, 9 O. R. 551.

In order to recover upon a *quantum meruit* there must be a contract, express or implied, to pay something for the services. No such action lies upon volunteer services or on extra work rendered

by a volunteer already in employment: *Fabris v. Sala*, 11 W. L. R. 269.

Where services have been performed by one person for the benefit and at the request of another, and have been charged to the latter, the fact that a third person has subsequently agreed to pay for such services, and has had judgment recovered against him therefor by the person rendering them, will not prevent the latter recovering in an action against the person liable in the first instance unless the subsequent agreement amounts to a novation: *Herod v. Ferguson*, 25 O. R. 565. Where a contract on the part of a testator founded upon a valuable and sufficient consideration that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation: *Walker v. Boughner*, 18 O. R. 448. When a minor enters into a contract for hiring, the wages he earns belong to him and not his parent: *Delesdernier v. Burton*, 12 Chy. 569. A contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners: *Burnet v. Hope*, 9 O. R. 10. When the hiring is general it is presumed by law to be by the year: *Rettinger v. MacDougall*, 9 U. C. C. P. 485. Where services are rendered not on a contract of hiring nor gratuitously, but upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise: *Smith v. McGugan*, 21 A. R. 542, 21 S. C. R. 263.

A servant who enters into a contract to devote his entire time and attention to the interests of his master, and to engage in no other business, is liable in damages for the breach of that contract: but if he does work in a different capacity, and does not use time which should be devoted to his master's business, or engage in competitive undertakings, he is not liable to pay to his master the earnings or profits received by him in respect of such work. But no servant can be permitted to retain as against his employer profits acquired by engaging during his term of employment without his master's consent in any business which gives him an interest conflicting with his duty to that employer: *Sheppard Publishing Company v. Harkins*, 9 O. L. R. 504.

A business having been sold, the foreman who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain, his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the

month was a re-engagement for another year on the same terms, that as it appeared that the foreman knew that the business before the sale had been losing money, and could not be kept going without reductions of expenses and salaries; that he had been informed that the contracts with the employees had not been assumed by the purchaser; and that upon his own evidence there was no hiring for any definite period, but merely a temporary arrangement until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages and his action was rightly dismissed: *Bain v. Anderson*, 28 S. C. R. 481.

Plaintiff sued the defendants, F. and L., for wages due him for work done as a diver in saving goods from a wrecked steamer at the Island of Anticosti, and also for four-fourteenths of the proceeds of the goods saved, under an agreement to that effect. The defendant F. contested the claim as to the share of the proceeds claimed. In the County Court judgment was given in plaintiff's favour based on what purported to be an adjustment of the salvage account between F. and L. in the previous suit brought to secure a settlement of their accounts. There was no evidence as to who made the paper, or that the defendant F. knew its contents, and it appeared further that it had been handed to plaintiff's solicitor who was acting at the time as the solicitor of the defendant L. in connection with the previous suit, without prejudice, and on the understanding that it was not to be made use of in any other suit.

A contract to act as master of a vessel "for the season" is subject to the continued existence of the vessel: *Ellis v. Midland*, 7 A. R. 464. Where a person in the service of another under a yearly hiring is dismissed for cause by his employer during the currency of any one year, he is not entitled to any remuneration for the portion of the year that he has served; but if he has been paid any portion of such year's salary, the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service; and although the employer on dismissing his employee may have assigned no ground therefor, he is not precluded from afterwards shewing the entire ground for such dismissal: *Tibbs v. Wilkes*, 23 Chy. 439. When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to justify dismissal, he cannot retain him in his employment and afterwards at some distant time turn him away for that fault without anything new; and this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offence may be invoked and may be put in the scale against the offender as cause for dismissal. Condonation is a question of fact for the jury, if in the opinion of the Judge there is any evidence of it to be laid before them. In an action for damages for wrongful dis-

missal tried with a jury, it is for the Judge to say whether the alleged acts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction: *McIntyre v. Hockin*, 16 A. R. 498. It is good cause for the summary dismissal by a railway company of one of their employees, that he has proved while on duty to have drunk intoxicating liquor with other employees: *Marshall v. Central Ontario R. W. Co.*, 28 O. R. 241. Where a bookkeeper is engaged for the term of one year, and his employment is continued after the expiration of that time, there is no presumption that it is to continue for another year absolutely: *Harnwell v. Parry Sound Lumber Co.*, 24 A. R. 110. Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year, is a question of fact to be decided upon the circumstances of the case. In an action on an oral agreement made in November for the hiring of plaintiff by defendant for a year, from the 1st December then next: Held, that there could be no recovery for wrongful dismissal within a year; and that there being an express agreement in fact no other agreement for a monthly hiring could be implied: *Harper v. Davies*, 45 U. C. R. 442. A contract of hiring for a year or more, defeasible within the year, is within section 4 of the Statute of Frauds. The agreement as alleged by the plaintiff was made in February, 1880, whereby the defendant was to pay him for his services, while he should remain in defendant's employment at the rate of \$500 a year for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties and his salary to commence on the 3rd March then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year and for such longer period as might be agreed upon: Held, clearly within the statute: *Booth v. Prittie*, 6 A. R. 680. Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal: *Jones v. Linde, British Refrigeration Co.*, 32 O. R. 191. The proper question to be left to the jury upon a justification of the dismissal for drunkenness would be: "Was the plaintiff so conducting himself that it would have been injurious to the interest of the defendants to have kept him; did he act in a manner incompatible with the due and faithful discharge of his duty; did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master?" *McEdwards v. The Ogilvie Milling Co.*, 4 M. L. R. 1 (Man.). A single disrespectful retort by an employee which has been provoked or called forth by an unbecoming remark of the employer, is not a sufficient ground for dismissal of the employee: *Williams v. Hammond*, 16 Man. L. R. 339.

The forgetfulness of a servant in the performance of an important part of his duty need not be habitual in order to amount to neg-

ligence justifying his dismissal without notice. A single act of forgetfulness may, under certain circumstances, be sufficient: *Baster v. London and County Printing Works*, 68 L. J. Q. B. 622; (1899), 1 Q. B. 901; 80 L. T. 757; 47 W. R. 639; 63 J. P. 433.

Moral character of servant as disclosed by himself unfit for position, justified dismissal: *Denham v. Patrick* (1910), 15 O. W. R. 349. Defendants set up custom among land surveyors and assistants to terminate their employment at any time without notice. Plaintiff held entitled to recover: *Andrew v. Pacific Coast Coal Mines*, 12 W. L. R. 163.

Payment by commission, judgment for plaintiff with reference: *McDougal v. Van Allen* (1909), 14 O. W. R. 173; 19 O. L. R. 351. The living was an indefinite one, the service to be paid at a certain rate per day. The presumption was in favour of a yearly living which was not rebutted. Plaintiff entitled to reasonable notice: *Gould v. McCrae*, 9 O. W. R. 626; 14 O. L. R. 194.

ACTIONS RELATING TO SALE OF GOODS.

At common law a sale of personal property is good though the bargain be oral. The contract is good though neither the money be paid or a day expressly named for payment. When the terms are agreed upon and bargain struck and everything done by the seller is complete the contract becomes absolute without payment or delivery and the property and risk of accident vest in the buyer. Blackstone Comm. II. 447-8). The article must be ascertained and *in esse*.

By the laws of England under a contract for sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller unless it can be shewn that such was not the intention of the parties. If the seller is to do something to the goods sold the property will not be changed until he has done it, or waived his right to do it. There is no distinction between the law of England and the law in force in Upper Canada in this respect: *Gilmour v. Supple*, 11 Moo. P. C. 551. Held, that where goods and merchandise are sold by weight the contract of sale is not perfect, and the property in the goods remains in the vendor, and they are at his risk until they are weighed or until the buyer is in default to have them weighed; and this is so even when the buyer has made an examination of the goods and rejected such as were not to his satisfaction. Held, also, that where goods are sold by weight, and the property remains in the possession of the vendor, the vendor becomes in law a depositary, and if the goods while in his possession are damaged through his fault and negligence, he cannot bring action for their value: *Ross v. Hannan*, 19 S. C. R. 227.

The case lastly referred to is an illustration of the doctrine that if the bargain requires anything further to be done by the seller, as to make the article, or to set apart or ascertain the price of the goods sold by weight, number, measurement, selection or otherwise, the property does not pass until they are in a state fit for delivery: *Tenner v. Smith*, L. R. 4 C. P. 270. If it is the intention of the parties that the property shall pass, it does pass, though there are acts to be done by the vendor: *Turley v. Bates*, 2 H. & C. 200.

Section 9 of the Statute of Frauds, R. S. O. 1897, c. 338 (sec. 16 of 29 Car. II., c. 13) is as follows:—

“No contract for the sale of any goods, wares or merchandises for the price of forty dollars or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

The Statute of Frauds is found in the several Provinces as follows:—

Alberta, 1906, c. 27.

British Columbia, 1903, c. 20.

Manitoba, R. S. 1902, c. 152. (Sales of Goods Act.)

New Brunswick, C. S. 1903, c. 140.

Nova Scotia, R. S. 1900, c. 141.

Ontario, R. S. 1897, c. 338.

By section 9 of R. S. O. 1897, c. 146, *An Act Respecting Written Promises and Acknowledgments of Liability*, it is provided that section 17 of the Statute of Frauds “shall extend to all contracts for the sale of goods of the value of \$40 and upwards, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of the contract be actually made, procured or provided or fit or ready for delivery or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.”

The Statute of Frauds must be specially pleaded, C. R. 271. The cases on the Statute of Frauds are collected *post*, under heading in Part III., Defence of Statute of Frauds. The main points to be considered with reference to the Statute are:—

- (1) Acceptance and Receipt. “accept and actually receive.” Acceptance without a delivery is insufficient.
- (2) Earnest or part payment.
- (3) What is a sufficient note.
- (4) The note or memorandum is sufficient if signed by the party to be charged—need not be signed by both parties.
- (5) Agency—agent need not be appointed in writing.

ACTION FOR NOT ACCEPTING GOODS.

The plaintiff must prove: 1. The contract; 2. The performance of all conditions precedent on his part; 3. The refusal to receive; 4. The amount of damage.

It is most commonly in this action that the question as to the validity of contract of sale without writing arises.

On a contract of sale the obligations of the buyer are: 1. To accept the article sold; 2. To pay the price.

The precise time of the change and vesting of the property and the risk of loss are also questions incidental.

In an action for not accepting goods, the difference between the contract price and the market price on the day the contract was broken is an ordinary measure of damages.

DEFENCE.

Denial of contract.

Repudiation of goods.

Wilful misrepresentation by vendor.

In the case of sales by sample, if the bulk does not correspond, the defendant may refuse to receive it, and may keep the article a reasonable time to examine and then repudiate it.

Where, after receiving the goods, the buyer tries to re-sell them, using for the purpose a sample obtained from the sellers, and keeps the goods for a month, there is an acceptance by him of the goods within the meaning of s. 4, s.-s. 3, of the Sale of Goods Act, 1893, although he does not inspect the goods or take a sample from the bulk: *Taylor v. Smith* (61 L. J. Q. B. 331; (1893), 2 Q. B. 65), declares no principle of law, and is of no general application: *Taylor v. Great Eastern Railway*, 70 L. J. K. B. 499; (1901), 1 K. B. 774.

Where goods are sold by sample the place of delivery is in the absence of a special agreement to the contrary the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase. Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general: *Trent Valley Woollen Mfg. Co. v. Oelrichs*, 23 S. C. R. 682.

Eggs were sold by sample f. o. b. London. There was no wilful delay in shipping on plaintiff's part. Defendant, who lived in Ottawa, learning that the eggs had been frozen in transit owing to the sudden drop in the temperature, wished to inspect before accepting the draft: Held, that inspection should have been made at London and plaintiffs must be paid their losses on the re-sale, expenses and commission: *McLean v. Freedman*, 12 O. W. R. 1038.

In the action for not accepting goods in case of written contract, proof must be given that the requisites of the Statute of Frauds as to acceptance have been observed. In this action what is required is proof of delivery. The facts which constitute a delivery are not the same as the facts which constitute an acceptance; e.g., an acceptance and receipt of part satisfies the statute as to the whole, but is not a delivery of the whole for the purpose of this action. To maintain this action, delivery to a carrier may be sufficient, though not to dispense with a written contract, for he has no authority as carrier to accept: *Meredith v. Meigh*, 2 E. & B. 364. Delivery may be made to a third person at the defendant's request.

ACTION FOR NOT DELIVERING GOODS.

On a contract of sale the obligations of the seller are:—

1. To deliver or preserve for delivery to the buyer.
2. To perform warranties, express or implied.
3. Neither wilfully to misrepresent nor fraudulently to conceal anything relating to the article sold.

In an action against vendor of goods for not delivering them, the plaintiff may be called upon to prove the contract and the breach, the performance of all conditions precedent on his part (principally readiness to receive and to pay), and the amount of damages.

In support of averment that the plaintiff was ready and willing to accept the goods and pay for the same, a demand of the goods is sufficient evidence: *Wilks v. Atkinson*, 1 Marsh. 412. Non-delivery depends on stipulations of contract. If no place is named, the buyer must fetch the goods.

Where goods are to be delivered at a future day, the damages for breach of contract are the difference between the contract price and the market price of the goods at the day when they ought to have been delivered. See *Hendrie v. Neelon*, 12 A. R. 41.

DEFENCE.

Statute of Frauds. Want of readiness of plaintiff to accept. Insolvency of vendee.

An action for goods jettisoned will lie although the master has signed clean bills of lading for them and should not have stowed them on deck: *Cameron v. Domville*, 1 P. & B. 647. Where the goods are laden on deck according to the custom of a particular trade, the owner thereof is entitled to contribution in general average for

loss by jettison: *Marks v. Watson*, 2 Kerr, 211 (N.B.). Where before the time for the completion of a contract for the sale of goods, one party notifies the other that he does not intend to complete, that notification may be treated as a breach and at once acted on; but if, as he may, the other party waits till the time for completion and then brings his action, he must shew that at this time he had himself fulfilled all conditions precedent on his part: *Dalrymple v. Scott*, 19 A. R. 477. Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible. *Taylor v. Caldwell*, 3 B. & S. 826, followed: *Grant v. Armour*, 25 O. R. 7. Where seed is delivered by one person to another without any warranty, honestly believing it to be clean, to be grown on the land of the latter, the produce thereof to be returned and paid for at a fixed price per bushel, the transaction is a bailment and not a sale: and damages arising from other innocuous seed having been mixed therewith and on harvesting having become scattered on the ground and coming up the following year on the land, are too remote and not within the rule laid down in *Hadley v. Baxendale*, 9 Exch. 341, and *Corey v. Thames Ironworks Co.*, L. R. 3 Q. B. 181; *McMullen v. Free*, 13 O. R. 57, and *Smith v. Green*, 1 C. P. D. 92, distinguished: *Stewart v. Sculthorp*, 25 O. R. 544. Where a bailee accepts a bailment and undertakes to re-deliver to his bailor, but is evicted by title paramount, he is not, unless there is a special contract or he is in some way to blame for the loss, responsible to the bailor for injury suffered by the latter. *Biddle v. Bond*, 6 B. & S. 225, followed: *Ross v. Edwards*, 11 R. 574.

ACTION FOR GOODS SOLD AND DELIVERED.

The Dominion Act respecting Weights and Measures, R. S. C. c. 52, contains the following sections:—

24. Every contract, bargain, sale or dealing made or had in Canada, in respect of any work, goods, wares, or merchandise, or other thing which has been or is to be done, sold, delivered, carried or agreed for by weight or measure, shall be deemed to be made and had according to one of the Dominion weights or measures ascertained by this Act, or to some multiple or part thereof, and if not so made or had, shall be void, except when made according to the metric system, and all tolls and duties charged or collected according to weight or measure shall be charged and collected according to one of the Dominion weights or measures ascertained by this Act, or to some multiple or part thereof.

25. All articles sold by weight shall be sold by avoirdupois weight, except that gold and silver, platinum and precious stones and articles

made thereof, may be sold by the ounce troy, or by any decimal part of such ounce, and all contracts, bargains, sales, and dealings in relation thereto shall be deemed to be made and had by such weight, and when so made or had shall be valid.

27. The use of local or customary measures or of heaped measures shall not be lawful.

29. No contract or agreement shall be invalid or open to objection on the ground that the weights or measures expressed or referred to therein are weights or measures of the metric system, or on the ground that decimal subdivisions of Dominion weights and measures, whether metric or otherwise, are used in such contract or dealing.

Plaintiff must prove: 1. Contract of sale; 2. Delivery of goods according to contract; 3. Value or price.

Statute of Frauds not so often brought in here, because generally the delivery on which the action is founded amounts to receipt and acceptance, though not necessarily.

In general, proof of the delivery of the goods to and receipt of them by the defendant is *prima facie* evidence of the contract, and supersedes the proof of an order; but this may be rebutted, as by proof that the defendant was in the habit of selling such goods for the plaintiff on commission: *Miller v. Newman*, 4 M. & Gr. 646.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort and sue on the implied contract. Then he must shew a title to the property: *Lee v. Shore*, 1 B. & C. 94.

A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery: *Smith v. Chance*, 2 B. & A. 755.

Action brought before credit expired. In calculating the time of credit the day of the sale must be excluded: *Webb v. Fairmaner*, 3 M. & W. 473. An action for goods bargained and sold, to be paid for by instalments, cannot be maintained until the full period of credit has expired: *Moore v. Kuntz*, 44 U. C. R. 309.

Unless a contrary intention appears where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer at the time the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed: *Craig v. Beardmore*, 7 O. L. R. 674.

Whether the property in goods contracted to be sold has or has not passed to the purchaser, depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained: *Wilson v. Shaver*, 3 O. L. R. 110.

Where the property has passed to the buyer the vendor may sue *for goods bargained and sold*, and will be entitled to recover the whole value of the goods. There must have been an acceptance of part, or part payment, or earnest, or a note or memorandum in writing within the Statute of Frauds: *Hankey v. Smith*, Peake, 42, n.

Where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by the act of God or *vis major*, over which neither party has any control, and without either party's default, the parties are relieved: *McKenna v. McNamee*, 14 A. R. 339, 15 S. C. R. 311. Where goods the subject of an executory contract of sale have passed into the possession of the vendee without payment therefor being made, and have while in such possession been lost or destroyed through no default of the vendor, the vendee is liable for the price notwithstanding that the property in the goods had not by the terms of the contract passed to the vendee, and notwithstanding that no negligence on his part is shewn: *Hesselbacher v. Ballantyne*, 28 O. R. 182, 25 A. R. 36.

After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, and that on default vendors should be at liberty to resume possession, nothing being said as to resale, the vendors seized the machine and resold it, the plaintiffs (the vendors) were held to have no right of action for the unpaid balance: *Sawyer v. Pringle*, 18 A. R. 218. Followed in *Arnold v. Playter*, 22 O. R. 608.

Meaning of term, "carload:" *Hanley v. Canadian Packing Co.*, 21 A. R. 119.

Plaintiffs shipped goods to defendant at a station on the Canadian Northern, but the goods never reached there:—Held, that the buyer has the right to examine goods; that there has been no acceptance, and therefore the property in the goods remained in the seller, who is the proper party to bring an action against the railway company which failed to deliver the goods. Action dismissed: *Steven v. Burch*, 10 W. L. R. Appeal dismissed, 10 W. L. R. 400.

Where the contract has been made with an *agent* and delivery to him, the seller may in some cases resort to the principal. Where the principal is unnamed or unknown at the time of sale, the following has been laid down as the rule:—"If a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller

knows not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gandassequi*, 4 Taunt. 574, and *Paterson v. Gandassequi*, 15 East. 62, the seller cannot afterwards, on the failure of the agent, turn around and charge the principal, having once made an election at the time when he had the power of choosing between the one and the other:" *Thomson v. Davenport*, 9 B. & C. 78, 2 Sm. L. Cas.

A person who sells goods to the agent of an undisclosed principal, believing the agent to be the principal, may sue the principal on discovery of the facts, and the principal will not be discharged from liability by having made payment to the agent before such discovery, unless the conduct of the seller has been such as to make it unjust for him to call upon the principal for payment, or unless the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone: *Irvine v. Watson*, 5 Q. B. D. 102, and *Heald v. Kenworthy*, 10 Ex. 739, followed: *Arbuthnot v. Dupas*, 15 Man. L. R. 634, 2 W. L. R. 445.

The fact of the principal's name being disclosed at the time of the sale does not, until the seller has elected to charge the agent, prevent his resorting to the principal: such disclosure merely enables the seller to charge the principal in the first instance if he so desire: *Calder v. Dobel*, L. R. 6 C. P. 486; *Becherer v. Asher*, 23 A. R. 202. When the seller elects to sue an undisclosed principal, it is a good defence if the defendant show that he has paid his agent, and the books of the seller cannot be admitted as evidence for him that he always debited the principal: *Smyth v. Anderson*, 7 C. R. 21. Where the seller has sued the agent to judgment he cannot, although he has not received satisfaction, afterwards proceed against the principal: *Priestly v. Fernie*, 3 H. & C. 977.

The travelling salesman of a wholesale dealer is presumably not authorized by the customer who buys from him to sign a contract for the customer as purchaser; and this presumption is not rebutted by a written memorandum of the order being made in the purchaser's presence and a duplicate given to the latter; the entry of the purchaser's name made by the salesman is not evidence *per se* of his agency: *Imperial Cap Co. v. Cohen*, 11 O. L. R. 382, 7 O. W. R. 128.

Goods delivered in pursuance of an order by one partner are delivered to all, unless it appear that they were delivered on the exclusive credit of one only: *Bottomley v. Nuttall*, 5 C. B., N. S. 122. A question sometimes arises in such actions, whether all the defendants are liable as partners.

A *joint stock company* is in the nature of a partnership. When incorporated the direct liability of individual members ceases. A question frequently arises, What is the liability of persons who have become subscribers to a company projected but not finally established?

An action for goods sold and delivered will not lie against the personal representative of a deceased partner to recover the price of goods ordered by the partnership before but not delivered until after the death of the partner: *Bagel v. Miller*, 72 L. J. K. B. 495; (1903), 2 K. B. 212; 88 L. T. 769; 8 Com. Cas. 218.

H. fraudulently represented to the plaintiffs that he was the agent of the defendants sent by them to make a purchase of goods. He was not in fact in the defendant's employment, they did not send him to make the purchase, nor did they know he was going to make it; but on the contrary after he had so fraudulently obtained the goods, they purchased the goods from him and paid him in full without knowing where he had purchased. The goods were afterwards sold by the defendants in the ordinary course of their business:—Held, that the property in the goods did not pass to the defendants, and they were liable to the plaintiffs for conversion. *Cundy v. Lindsay*, 3 App. Cas. 459, applied. There was no contract between the plaintiffs and defendants—no *consensus ad idem*—and no contract between the plaintiffs and H.: *Eby-Blain Co. v. Frankel*, 23 Occ. N. 173.

The plaintiffs sued a bank to recover the price paid the bank for certain goods, which owing to a customs' seizure and forfeiture the plaintiffs never received. The bank were never in actual possession of the goods, but a bill of lading was indorsed to them as a security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs. The jury found that it was the bank who sold the goods to the plaintiffs; that they professed to sell with a good title; and that the plaintiffs could not by any diligence have obtained the goods: Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. C. c. 120, the transaction must be regarded as a sale by the bank as pledgees, with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading, and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration. *Worley v. Attenborough*, 3 Ex. 500, commented on and distinguished: *Peuchen v. Imperial Bank*, 20 O. R. 325.

Where undisclosed principals carrying on a wholesale business employ an agent to carry on a retail business in his own name, but for their benefit to sell their goods at invoice prices, they are not liable for the price of goods of the same kind purchased by the agent for himself from other persons without the knowledge or authority

of his employers. *Watteau v. Fenwick* (1893), 1 Q. B. 346, considered: *Becherer v. Asher*, 23 A. R. 202.

Where a husband gives his wife express authority to pledge his credit, she becomes his agent. As to implied authority, see *Manby v. Scott*, and other cases, 2 Smith L. Cas. Where a wife is living separate, it lies on the plaintiff to show that she does so under circumstances which imply an authority to pledge her husband's credit: *Johnston v. Sumner*, 3 H. & N. 261.

The plaintiff must prove either that the defendant and the woman to whom the goods are delivered are married, of which it is sufficient *prima facie* evidence that they are living together, or that she and the defendant cohabited, and that she passed as his wife with his assent, assumed his name, and lived in his house as part of his family: *Car v. King*, 12 Mod. 372; *Watson v. Threlkeld*, 2 Esp. 637.

The father of an *infant* to whom goods are supplied is only liable where an actual authority from him to his child is proved, or circumstances appear from which such an authority can be implied: *Rolfe v. Abbott*, 6 C. & P. 286.

Where goods sold without any agreement as to price, value must be proved.

When there is no actual agreement as to price or time of payment the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price, and by implying in the absence of evidence to the contrary that payment should be made on delivery: *Christie v. Burnett*, 10 O. R. 609.

To sue for goods bargained and sold the plaintiff must prove a certain price agreed upon; if he cannot, there should be a special count for not accepting: *Elvidge v. Richardson*, 3 U. C. R. 149.

On a mistake of vendor as to identity of vendee he obtained a judgment against the wrong vendee. In spite of that judgment, which the Court vacated, he obtained judgment against the right vendee: *Keating v. Graham*, 26 O. R. 361.

Stoppage in transitu does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price: *Brassert v. McEwen*, 10 O. R. 179.

Lex fori governs *Bryson v. Graham*, 2 Thom. 271 (N.S.). Plaintiff sued for goods sold and delivered. Defendant pleaded the Statute of Limitations. Plaintiff replied that at the time the action accrued defendant was absent from the province, and that suit was brought when defendant came within the jurisdiction of the Court. The cause of action had accrued in Prince Edward Island, and it seemed that according to the law of that province the debt was barred by the Statutes, but was not barred by the Statute of Nova Scotia: Held, that admitting the debt to be out of date in Prince Edward Island,

the plaintiff might nevertheless recover in Nova Scotia, as only the plaintiff's remedy was thereby barred, and the debt was not extinguished: *Carvell, et al., v. Wallace*, 3 N. S. D. L. 165 (N.S.).

The Court will decree specific performance of a contract for the manufacture and sale of saw-logs, where they are capable of being identified and possess a peculiar value for the purchaser: *Stevenson v. Clarke*, 4 Gr. 540; *Fuller v. Richmond*, 2 Chy. 24, S. C., 4 Chy. 657; *Farwell v. Walbridge*, 6 Chy. 634.

A mortgage on saw-logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out of the logs mortgaged: *White v. Brown*, 12 U. C. R. 477.

An agreement that A. shall saw certain logs, and deliver the lumber at his mill to B, as soon as he is able, such sawing to be paid for immediately on delivery, is not void for uncertainty: *O'Donnell v. Hugill*, 11 U. C. R. 441.

A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the goods by unloading them from the cars on arrival and teaming them to his own premises, if he then finds them to be inferior to what he had ordered and so notifies the vendor within a reasonable time: *Creighton v. Pacific Coast Lumber Co.*, 12 M. L. R. 546 (Man.).

A suspensive condition in an agreement for the sale of movables whereby until the whole of the price shall have been paid the property in the thing sold is reserved to the vendor, is a valid condition: *Banque D'Hochelaga v. Waterous Engine Works Co.*, 27 S. C. R. 406. A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods, except, perhaps, where the goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner. In the case of a sale of iron to be made in Scotland: Held, upon the evidence that the sale was absolute, and not subject to any condition as to the arrival of the goods: *Fleury v. Capeland*, 36 U. C. R. 36.

Case for not accepting flour. The witnesses on the trial were agreed in the opinion that the words "free on board" included the shipment and all port and harbor charges, such as canal dues, wharfage, etc.: Held that the defendant had a right before paying, to see the flour free on board: *George v. Glass*, 14 U. C. R. 514.

In absence of evidence shewing a different intention, goods sold F.O.B. any particular place must arrive at that place before delivery is complete: *Stephens Bros. v. Burch* (1909), 2 Alt. L. R. 68.

Held, reversing the judgment in 29 U. C. R. 168, that upon a contract for the sale of 10,000 bushels of oats, "at 40 cents per 34 lbs., free on board at Kingston," the purchaser was not bound to

pay or tender the price before requiring the seller to put the goods on board: *Clark v. Rose*, 29 U. C. R. 392.

Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request should be averred: *Daly v. Stevenson*, 5 O. S. 737.

Where before the time for the completion of a contract for the sale of goods one party notifies the other that he does not intend to complete, that notification may be treated as a breach and at once acted upon; but if, as he may, the other party waits for the time for completion and then brings his action, he must show that at this time he had himself fulfilled all conditions precedent on his part: *Dalrymple v. Scott*, 19 A. R. 477.

In a contract for sale of goods to be delivered in different instalments a breach by one party in connection with one instalment may reasonably lead to the inference that similar breaches will be committed in relation to subsequent instalments and in such a case the whole contract may there and then be regarded as repudiated and may be rescinded: *Millars Karride v. Weddel*, 100 L. T. 128.

Inspection should be made at place of delivery: *Ramsay v. N. Y. C. R. R. Co.*, 13 O. W. R. 431; *McLean v. Freedman*, 12 O. W. R. 1038.

Agreement to buy lumber by inspection of S. Inspection held a condition precedent to the obligation to accept: see *Aitcheson v. Cook*, 37 U. C. R. 490.

Plaintiffs bought from defendant certain coal shipped to defendant at Toronto from a foreign port, and then laying on board the vessel in the Welland Canal. A sale note was given stating only the quantity and price, and the time by which it was to be taken out of the vessel: Held, that defendant was not obliged to pay the import duties. Held, also, that evidence was rightly admitted to shew the usage of the trade on sales made under such circumstances: *Brown v. Browne*, 9 U. C. R. 312. In contracts for the sale and delivery of flour at a future day and in like cases, time is strictly of the essence of the contract: *Coleman v. McDermott*, 1 E. & A. 445.

The delivery of a bill of parcels after the sale of goods on which a receipt was given for the price, does not exclude parol evidence of the representation as to quality: *Magee v. Street*, 1 All. 242 (N.B.).

Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description. On a sale of goods, when the buyer has no opportunity of inspection, the maxim *caveat emptor* does not apply *Moore v. Gooderham and Worts*, 14 O. R. 451. Where a person manufacturing flour, marks it as of a particular quality that

amounts to a warranty of its being of such quality. Held, that in this case the evidence of representations made by the seller at the time of sale were sufficient to warrant the jury in finding an express warranty: *Chisholm v. Proudfoot*, 15 U. C. R. 203.

There is a distinction made between the sale of a specific article with a warranty and an executory contract for the supply of goods of a particular quality. In the last case the goods may be refused or returned if not of the kind contracted for; but in the former case the remedy is either an action by the buyer on the warranty, or proof by him in reduction of damages in an action by the vendor, unless there be not merely misrepresentation or breach of warranty, but fraud, or unless there be a condition in the contract providing for the return of the goods in such case: *Street v. Blay*, 2 B. & Ad. 463. A wilful misrepresentation by the vendor, which induced the defendant to purchase, "even with all faults," will be the ground of a good defence: *Baglehole v. Walters*, 3 Camp. 154.

In a sale of a specific ascertained article by one who is not a producer or manufacturer for a particular purpose known to the vendor at the time of sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose for which it is intended, if the vendee has inspected or has had the opportunity of inspecting it before purchasing: *Jordon v. Leonard*, 36 N. B. Reps. 518.

Where a chattel sold with a warranty is delivered as agreed upon, and is not up to the warranty, that fact in the absence of fraud affords no ground for rescinding the contract, but the remedy is for a breach of warranty. A Court of Appeal will not disturb the finding of a jury on a question of fraudulent representations where there is any evidence upon which the verdict may reasonably be supported. Evidence of the value of the chattel (a horse) at the time of the trial, a year after the sale, was properly rejected when offered to prove the value at the time of the sale: *Finn v. Brown*, 35 N. B. Reps. 325.

In an action between vendor and purchaser for the price of a machine sold under a conditional sale, the defendant may shew that the machine was not as warranted, and so reduce the claim by the difference between the value of the machine as warranted and its actual value. *Tomlinson v. Morris*, 12 O. R. 311, specially referred to: *Cull v. Roberts*, 28 O. R. 591.

Every affirmation as to the character of goods at the time of the sale is a warranty, but it must appear that the representation was intended as a warranty, and was relied upon by the purchaser, and formed a part of the contract: *Taylor v. Poirier*, 8 W. L. R. 949, 1 Sask. L. R. 264.

Held, that on a sale of ascertained goods, described as second-hand, which the buyer has had no opportunity of inspecting, representations as to the length of time during which such goods have been used and the present condition thereof constitute part of the description and are not merely a collateral warranty, and the buyer is entitled to reject the goods if they do not correspond with the description. 2. That, following *Varley v. Whipp* (1900), 1 Q. B. 513, 68 L. J. B. 444, when goods are so sold the property does not pass upon shipment, nor until the buyer has had an opportunity of inspecting the goods and signifying his acceptance. 3. That when such goods do not answer the description no notice of rejection need be given by the buyer: *Bannerman v. Harlow*, 1 Sask. L. R. 301, S. C. *sub nom.*; *Bannerman v. Barlow*, 7 W. L. R. 859.

The buyer of a chattel impaired by a latent defect has the option of surrendering it and recovering the price or of keeping it and recovering a part of the price in proportion of the defect. He is also entitled to damages when the seller knew or is presumed to have known of the defect at the time of the sale: but he has no action to compel the seller to remedy the defect. He must use reasonable diligence in resorting to his remedy; and, when he allows ten months to elapse between the detection of the defect and the institution of the action, the latter is brought too late: *Phelan v. Montreal Investment and Freehold Co.*, Q. R. 35 S. C. 72.

Independently of any warranty, there arises out of a sale of goods possessing a dangerous quality, which the seller knows and the buyer presumably does not know, a relation between the seller and the buyer which imposes on the seller the duty of warning the buyer of that dangerous quality: *Clarke v. Army and Navy Co-Operative Society*, 72 L. J. K. B. 153; (1903) 1 K. B. 155; 88 L. T. 1.

On sale of ascertained goods by description representations constitute part of description and are not merely collateral warranty. Property in such goods does not pass until inspection: *Varley v. Whipp* (1900), 1 Q. B. 513; *Bannerman v. Barlow*, 7 W. L. R. 859.

Special condition not having been brought to defendant's attention, plaintiff's express warranty stands with this provision eliminated: *Sawyer-Massey v. Ritchie*, 10 W. L. R. 457. See *American-Abell v. Touround*, 10 W. L. R. 413, where defendant could not read English.

Effect of retention may be to lose right of rejection, but subject to claim for damage through breach of warranty or by way of counterclaim: *Couston v. Chapman*, L. R. 2 H. L. Sc. 250; *Grimalby v. Wells*, L. R. 10 C. P. 393.

Plaintiff retaining power of disposal and control until payment property does not pass: *Graham v. Laird* (1909), 14 O. W. R. 1.

The purchaser of a chattel is entitled to recover from the vendor upon failure of title the value of the chattel and not merely the amount paid by him to the vendor: *Confederation Life Association v. Labatt*, 27 A. R. 321.

Action for damages for breach of a warranty on the sale of a second-hand engine, that the engine was in a good state of repair and in good working order: Held, that, under s.-s. (d) of s. 52 of the Sale of Goods Act, R. S. M. 1902, c. 152, the proper measure of damages to be allowed is the amount which at the time of the sale it would have been necessary to expend in order to remove defects which constituted the breach of the warranty, but not including cost of repairs necessitated by wear and tear or accidents after the plaintiff began to use the engine. *Cook v. Thomas*, 6 Man. L. R. 286, followed. *Sumner v. Dobbin*, 16 Man. L. R. 491.

The measure of damages for non-delivery of goods sold is ascertained by the difference between the contract price and the market or current price thereof at the time the breach of contract takes place: *McGillis v. Huot*, Q. R. 29 S. C. 350.

A party who contracts for the manufacture of machinery, and afterwards notifies the manufacturer that he will not accept delivery of it, unless certain guarantees respecting it, not mentioned in the contract, be given him, is thereby held to repudiate the contract, and becomes liable for the price of the machinery, less whatever value it may have for the manufacturer: *Morgan-Smith v. Montreal Light, Heat & Power Co.*, Q. R. 30 S. C. 242.

The measure of damages, apart from special circumstances, which the manufacturer of an article that has had to be destroyed by the fault of another is entitled to recover, is the price which he could have sold it for on the day that it had to be destroyed: Held, therefore, that, although the plaintiffs were brewers, they were entitled to recover the full selling value of the beer in their cellars which had by the fault of the defendants to be thrown away, and not merely such a sum as they themselves must have expended in order to brew an equal amount of beer of the same quality to replace it: *Holden v. Bostock*, 50 W. R. 323.

In estimating damages every reasonable presumption may be made as to the benefit which plaintiff might have received from *bona fide* performance of agreement: *Bank of Ottawa v. Wilton*, 10 W. L. R. 331.

ACTION FOR WORK AND MATERIALS.

The plaintiff's proofs are: 1. The contract, express or implied; 2. The performance of the work or supply of materials (if any); 3. The value (if remuneration not ascertained by contract).

In action for non-performance of contract to do work, plaintiff must show willingness and readiness on his part to perform, and on the defendant's part a distinct and unequivocal refusal, and that such refusal was acted upon by plaintiff: *McLellan v. Winston*, 12 O. R. 431.

Where services have been performed by A. for the benefit and at the request of B., and which have been charged to B., the fact that C. has subsequently agreed to pay for such service, and has had judgment recovered against him therefor by A., will not prevent A. from recovering from B., unless the subsequent agreement amounts to a novation: *Herod v. Ferguson*, 25 O. R. 565. Where there was a special agreement, terms of which had been performed, it raised a duty for which an *indebitatus assumpsit*, or common counts, lay. If contract not executed, and plaintiff has been prevented from executing it by absolute refusal of defendant to perform his part of it, or by an act done by the defendant which has incapacitated plaintiff from performing it, the plaintiff may rescind contract and sue on a *quantum meruit*: *Planché v. Colburn*, 8 Bing. 14. The right to recover for loss of profits discussed: *Corbet v. Johnston*, 10 A. R. 564. If there is a special agreement, and work done and adopted by the defendant, though not strictly pursuant to such agreement, the plaintiff may recover on a *quantum meruit*: *Burn v. Miller*, 4 Taunt. 745. The defendant may refuse to pay for the subject-matter where it deviates, and in such cases the plaintiff cannot recover even on a *quantum meruit*: *Ellis v. Hamlin*, 3 Taunt. 52.

To fix a defendant with *extras*, the acceptance and adoption ought to be under circumstances which imply approval and waiver of the deviation, and make it practicable to repudiate: see *Re Toronto Drop Forge Co.*, 24 O. R. 191, where a lien on land for extra work was refused.

Architect's certificate. Apart from fraud, the wrongful withholding by surveyor of certificate affords no ground for action: see *Badgley v. Dickson*, 13 A. R. 494.

As to when a claim for work and labour, and when one for goods sold and delivered, is applicable, the rule is laid down in *Atkinson v. Bell*, 8 B. & C. 277. The power of amendment renders the distinctions less material than they were; but if the claim is not properly made for work and materials, but for not accepting a chattel, it may be defeated by a defence under the Statute of Frauds: see *Wolfenden v. Wilson*, 33 U. C. R. 442; *Canada Bank Note Co. v. Toronto R. W. Co.*, 22 O. R. 462.

If there is a deviation from the terms of contract, the plaintiff must prove assent of defendant to the deviation.

DEFENCE.

The following are good :

That work was done under special contract not executed.

That defendants, being a corporation, did not contract, or sufficiently contract, under seal. (See under *Corporation Deeds*.)

Contracts not under corporate seal made with trading corporations relating to purposes for which they are incorporated, or if partly performed and of such a nature as would induce the Court to decree specific performance thereof, if made between ordinary individuals, will be enforced against them: *Ont. Western Lumber Co. v. Citizens' El. Co.*, 16 C. L. T. 118. Compare *Bain v. Anderson*, 16 C. L. T. 143.

That defendants received no benefit from work, it having been improperly executed by plaintiff: see *Campbell v. McKerricher*, 6 O. R. 85.

Held, that where, as here, the contract is to do work for a specific sum, and this applies as well to original as to sub-contracts, there can be no recovery until the work is completed unless the failure to do so is caused by the defendant's fault; and as the plaintiff admitted the non-completion by suing on a *quantum meruit*, and there was nothing to show any fault on the defendant's part, there could be no recovery. *Appleby v. Meyers*, L. R. 2 C. P. 660, followed: *King v. Low*, 3 O. L. R. 234.

The absence of a final certificate a bar to recovery by a contractor: *Scott v. Liverpool*, 3 DeG. & J. 334; *Robinson v. Owen Sound*, 16 O. R. 121. As to a sub-contract, see *Petrie v. Hunter*, 10 A. R. 127. Although extras were done and there was some evidence as to delay by strikes, the architect was not asked for, and he did not grant any extension of time, the contract was held to govern, and the defendants were entitled to recover by way of counterclaim the sum provided by the contract as liquidated damages: *McNamara v. Skain*, 23 O. R. 103. Construction of building contract: *Neelon v. Toronto*, 25 S. C. R. 579. As to engineer's certificate on contract for Dominion Public Work: see *Murray v. Reg.*, 16 C. L. T. 241. Where a superintendent in charge of work was also to act as arbitrator on the contract, he was not disqualified from acting in that dual capacity: *McNamee v. Toronto*, 24 O. R. 313; *Farquhar v. Hamilton*, 20 A. R. 86. The powers of a municipality under a contract to put on men to finish the work discussed: *Mangan v. Windsor*, 24 O. R. 675.

Interest may be allowed on amounts from time they become payable: *McCullough v. Newlove*, 27 O. R. 627. Where there is a substantial performance of work under a special contract, though not in strict accordance with it, and there is not fraudulent or wilful devia-

tion from its terms, the contractor is entitled to recover for the work done; the measure of damages in such a case being the agreed price less such a sum as it would take to complete the work according to the contract: *McIntosh, et al., v. Cullen*, 2 Old. 268 (N.S.). 1. In actions upon *quantum meruit* for work and labour, defective workmanship may be proved in mitigation of damages, although not pleaded. *Secus*, if the action be upon a special contract. 2. In an action upon a special contract for the sale of a specific article for goods sold and delivered, evidence of a breach of a warranty may be given in reduction of the contract price, although not pleaded. 3. In an action for goods sold and delivered, and for work and labour, evidence of damages for delay cannot be given unless under a counterclaim. *Semble*. In an action by a carrier for freight evidence of damage to the goods cannot be given unless under a counterclaim: *Smith v. Strange*, 2 M. L. R. 101 (Man.). Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request should be averred: *Daily v. Stevenson*, 5 O. S. 737. The plaintiff having sued one of two contractors, the other being out of the jurisdiction, and having recovered judgment against him, cannot afterwards sue the other: *Harris v. Dunn*, 18 U. C. R. 352. A married woman having separate estate may enter into a contract along with others. *Semble*, if she, having no separate estate, is not liable under such a contract, the other contractors are liable without her: *Dingman v. Harris*, 26 O. R. 84. No action lies for the non-performance of a term of a contract which term is on its face impossible of performance by any of the parties: *Stratford Gas Co. v. City of Stratford*, 26 A. R. 109. Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts equal to eighty per cent. of this fixed sum as the work is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right of payment, and where the work is not completed there is no right to recover for the portion done as upon a *quantum meruit*: *Sherlock v. Powell*, 26 A. R. 407.

In an action on a contract, and alternately on a *quantum meruit*, to recover the price of certain specified work, if the contract is not properly carried out, the plaintiff can only recover the real value of the work done and the material supplied: *Chapel v. Hickes* (2 C. & M. 214) followed: *Stegman v. O'Connor*, 80 L. T. 234.

Parol Contract between Crown and Subject.—The provisions of s. 11 of 42 Vict. c. 7, and of s. 23 of R. S. C. c. 37, do not apply to the case of an executed contract; and where the Crown has received the benefit of work and labour done for it, or of goods or materials supplied to it, or of services rendered to it by the subject at the instance and request of its officer acting within the scope of

his duties, the law implies a promise on the part of the Crown to pay the fair value of the same: *Hall v. The Queen*, 3 Ex. C. R. 373.

Partial Performance.—Where there is a contract to do special work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a *quantum meruit*: *Sherlock v. Powell*, 26 A. R. 407.

A contract of agency contained no agreement by the principal to employ for any period or to manufacture any goods. These terms could not be imported into the contract by implication: *Morris v. Dinnick*, 25 O. R. 291.

When work is undertaken by contract or by estimate and bargain, and the articles produced by the work are destroyed by accident before completion and delivery to the employer, the loss is that of the workman or contractor: *Shallow v. Lessard*, Q. R. 14 K. B. 292.

When one contracts to do work for another the preparation for which involves outlay and expense, a corresponding agreement in the absence of any express provision will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made where from circumstances known to and in the contemplation of both parties at the date of the agreement to do the work, it was and continued to be beyond the power of the party to carry out such implied agreement, 14 A. R. 339: *McKenna v. McNamee*, 15 S. C. R. 311.

The construction of a contract cannot be affected by the declarations of the parties made subsequent to its date, though when the words are ambiguous they may be explained by the previous or contemporaneous conduct of the parties: *Houlder v. Com. of Public Works* (1908), A. C. 276.

Prospective damages are properly awarded for the breach of an annual contract which provides that the purchaser shall ultimately buy all the existing material in the possession of the vendor: *George D. Emery Co. v. Wells*, 75 L. J. P. C. 104; (1906), A. C. 515; 95 L. T. 589.

ACTION FOR MONEY PAID.

Plaintiff must prove: 1. The payment of money by the plaintiff; 2. That it was paid at request of defendant, and to his use.

The payment must be proved as a fact. The admission of the payee is not admissible against the defendant, unless the payee were the agent of the defendant for the purpose of making the admission.

The plaintiff must prove that the money was paid, and the money paid was *his* money.

As to request, a legal obligation for another's debt will be equivalent to a previous request, as where one person is a surety for another, and is called upon to pay, the money paid may be recovered, though not paid by desire of principal: *Exall v. Partridge*, 8 T. R. 310; *McNab v. Wagstaff*, 5 U. C. R. 588.

Where several are sureties, and one is compelled to pay the whole, he may recover in the action from each of his co-sureties, a rateable proportion of the moneys so paid: *Deering v. Winchelsea*, El. 2 B. & P. 270; *Geary v. The Gore Bank*, 5 Chy. 536.

This action does not lie for contribution or indemnity against a person jointly engaged with the plaintiff in doing a wrongful act by which the plaintiff is put to expense: *Merryweather v. Nizan*, 8 T. R. 186.

To support this action it must appear either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred by the plaintiff at his express or implied request, or on his guarantee: *Brittain v. Lloyd*, 14 M. & W. 762.

The indorser of a bill, who has been sued by the holder and paid the amount, cannot recover the costs of the former action, for the custom of merchants does not make an acceptor liable for the costs of actions against subsequent holders: *Dawson v. Morgan*, 9 B. & C. 618. If an administrator on competent advice pays a claim *bona fide* made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis*, nor a right of action to recover it back: *Mayhew v. Stone*, 26 S. C. R. 58. Over payment made by an executor held to have been made under mistake of fact and recoverable. *Gorham v. Kingston*, 17 O. R. 432, specially referred to: *Barber v. Clark*, 20 O. R. 522, affirmed 18 A. R. 435. Land belonging to a trust estate having been sold for taxes during the year allowed for redemption, the trustees who had been newly appointed paid the taxes for the current year in ignorance of the sale, and subsequently on learning the fact decided not to redeem, as the arrears exceeded the value of the land: Held, that they were not entitled to recover back the money as paid under a mistake of fact: *Trusts Corporation of Ontario v. City of Toronto*, 30 O. R. 209. In order to recover back money paid by plaintiff under an agreement for sale of lands to him on the ground of failure of consideration, plaintiff must give evidence of the terms of the agreement: *McDonald v. McDonald*, James 41 (N.S.). Held, that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the

state of the law, and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality. Judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 246) affirmed: *Canadian Pacific Railway Co. v. City of Quebec*; *Grand Trunk Railway Co. v. City of Quebec*, 30 S. C. R. 73. Where money has been received by a manufacturing corporation under a parol agreement to make payment for the same in articles of their manufacture, which they have failed to perform, an action of assumpsit lies to recover back the money: *Diamond v. The St. George Lime Company*, 2 Kerr. 537 (N.B.). A person seeking to recover money paid under mistake of fact is not now bound to shew that he has been guilty of no laches; the only limitation is, that he must not waive all inquiry: *Law Society of Upper Canada v. City of Toronto*, 25 U. C. R. 190.

Loan.—Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience: *Re Ross*, 29 Chy. 385.

The rule that money paid under compulsion of legal process cannot be recovered back does not apply where there has been an absence of *bona fides* on the part of the defendant; but the rule is applicable to a case where the plaintiff, although he has paid no money to the defendant, has by mistake given him credit for the payment on account which has not in fact been made: *Ward v. Wallis*, 60 L. J. Q. B. 423; (1900), 1 Q. B. 675; 82 L. T. 261.

ACTION FOR MONEY LENT.

In an action for money lent, the plaintiff will have to prove the loan of his money.

It is not sufficient to prove merely the payment of money to the defendant; for in such a case the presumption is that the money is paid in liquidation of an antecedent debt.

When a parent advances money to a child it is presumed to be a gift.

A loan of money secured by mortgage is recoverable as money lent if there is no covenant to pay the amount. Where a simple loan of money is secured by a covenant to repay the money, the creditor's only remedy is on the covenant. It is a defence that a simple contract has been subsequently merged. As an amendment would now be allowed, this distinction is not so important: *Re Ross*, 29 Chy. 385. Where money is meant to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is

open to public observation of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience: *Re Ross*, 29 Gr. 385. Where there is evidence of a loan or debt, a promise to repay it will be implied: *Hall v. Morley*, 8 U. C. R. 584.

When a promissory note is taken from the borrower as collateral security for money lent to him, and not in payment, an action can be brought for the money lent, notwithstanding that owing to the form of the note an action thereon could not be maintained: *Secor v. Gray*, 3 O. L. R. 34.

A cheque on a bank indorsed by the payee is not evidence of a loan to him by the drawer. Of itself and unexplained, it is a proof of payment by the drawer to the payee: *Allaire v. King*, Q. R. 33 S. C. 343.

ACTION FOR MONEY HAD AND RECEIVED.

The plaintiff must prove the receipt of the money by the defendant, and his own title to recover it as received for him. Also that money has been received. He must give evidence of some particular sum: *Barendale v. G. W. R. Co.*, 32 L. J. C. P. 225. The plaintiff must prove that it was his money, or that the money has been received to his (plaintiff's) use by defendant.

Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who paid it.

Conduct money received with a subpoena may be recovered by the party who paid it, where the attendance of the witness has been countermanded and he has incurred no expense. See *U. S. Exp. Co. v. Donohoe*, 14 O. R. 333: *Martin v. Andrews*, 7 E. & B. 1. Where a party paying money upon a forged instrument has not been guilty of any want of that caution which, on account of the character he fills, he is bound to exercise, and has not by his conduct effected the rights of any other parties to the instrument, he may in general recover the money paid under a mistake.

Money paid under mistake of law cannot in general be recovered: *Chesney v. St. John*, 4 App. R. 150; *Clark v. Eckroyd*, 12 App. R. 425. In this case, held, that demand for repayment or notice of mistake necessary before action: see *Freeman v. Jeffries*, L. R. 4 Ex. 189.

The plaintiff can only rescind a contract on the ground of fraud, when he can disaffirm the contract and remit the defendant to his former state: *Urquhart v. Macpherson*, 3 App. Cas. 821.

Money paid under mistake of fact can be recovered: see *The Law Society U. C. v. City of Toronto*, 25 U. C. R. 199; *Baldwin v. King-*

stone, 18 A. R. 63. Thus, overpayment to a legatee: *Barber v. Clark*, 20 O. R. 522.

Ignorance of Legal Result.—When a person has paid money with a full knowledge of facts, he cannot recover it back on the ground that he paid it in ignorance of the law resulting from those facts: *Perry v. Newcastle Fire Insurance Co.*, 8 U. C. R. 363.

Money obtained by fraud can be recovered: *McMaster v. Geddes*, 19 U. C. R. 216.

Where a man has been obliged involuntarily and by wrongful duress to pay, the money may be recovered.

Where an action is brought and a person pays the demand "without prejudice," he cannot recover the money so paid: *Brown v. McKinnally*, 1 Esp. 279.

Money paid under compulsion of law cannot be recovered: *Moore v. Fullen Vestry* (1895), 1 Q. B. 399.

Money recovered by regular legal process, though in fact not due, cannot be recovered in this action: *Marriot v. Hampton*, 7 T. R. 269.

A wrongful receipt by the defendant of the proceeds of goods wrongfully sold may be treated as a receipt to the plaintiff's use by waiving the tort: *Lythgoe v. Vernon*, 5 H. & N. 180.

Money stolen by the defendant from the plaintiff constitutes a debt from defendant to plaintiff: see *Wells v. Abrahams*, L. R. 7 Q. B. 554.

Money paid on illegal contracts is recoverable: 1. When the contract be executory, if the plaintiff be not *in pari delicto* with the defendant. 2. Money is recoverable from a stakeholder in whose hands it has been deposited on an illegal consideration, though executed by the happening of the event upon which a wager is made: see *Trebilcock v. Walsh*, 21 A. R. 56. 3. The money is recoverable though the contract be executed, if the plaintiff be not *in pari delicto* with the defendant. 4. Money is not recoverable where the contract is executed and plaintiff is *in pari delicto*.

The damages recoverable by a non-trading depositor in a bank, on the wrongful refusal of the bank to pay, are limited to the interest on the money: *Henderson v. Bank of Hamilton*, 25 O. R. 641. The rights of a trader are defined in *Marzetti v. Williams*, 1 B. & A. 415. And discussed in *Rolin v. Stewart*, 14 C. B. 594.

The onus of shewing that a solicitor who is in possession of a mortgage, and collects the interest, has authority also to collect the principal, is upon the mortgagor: *In re Tracy*, 21 A. R. 454.

If the Court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity or by giving him a lien on it. Accordingly, where money was stolen the owner

was held entitled to leasehold property, furniture and other chattels, purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing: *Merchants' Express Co. v. Morton*, 15 Chy. 274, 2 Ch. Ch. 319. Where a robbery had been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property in this country, the Court granted an injunction to restrain the selling or encumbering thereof: *Ib. Semble*, that money paid for tolls under compulsion in order to enjoy a road may be recovered in an action for money had and received: *Little v. Dundas and Waterloo Macadamized Road Co.*, 2 U. C. C. P. 299. An action for a certain legacy can be maintained in common law Courts against any person who under a will is made liable to pay such legacy and receives under such will funds sufficient to pay it. See 5th R. S. C. c. 113, s. 4: *Ells v. Ells*, 1 Thom. (2nd ed.) 173 (N.S.). Defendants pleaded in substance that the money, while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown without any neglect on their part. Remarks as to such defence and the facts required to sustain it: *Bickle v. Mathewson*, 26 U. C. R. 137. The plaintiff as executor of one W. having paid money to defendant as a legatee, and the will with the probate having been afterwards set aside by a decree, the plaintiff was held entitled to recover back the money: *Haldan v. Beatty*, 40 U. C. R. 110. A party may recover back money paid in forgetfulness of certain facts which had without doubt been known to him: *Perry v. Newcastle Fire Ins. Co.*, 8 U. C. R. 363. A person seeking to recover money paid under mistake of fact is not now bound to shew that he has been guilty of no laches; the only limitation is that he must not waive all inquiry: *Law Society of Upper Canada v. City of Toronto*, 25 U. C. R. 199. The fact of a payment having been made under protest, but without duress or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money: *Doe d. Morgan v. Boyer*, 9 U. C. R. 318. An action for distraining for more rent than is due cannot be maintained without a tender of the sum which is really due, and the excess paid cannot be recovered back as money had and received: *Owen v. Taylor*, 39 U. C. R. 358. Held, following *Breen v. Duckett*, 11 Q. B. D. 275, that the plaintiff was entitled to recover interest paid under protest by compulsion of a wrongful distress: *McKay v. Howard*, 6 O. R. 135. A surety paying the debt of his principal after arrangements between the creditor and the principal debtor, which would have discharged the surety, cannot recover back the money so paid: *Geary v. Gore Bank*, 5 Chy. 536. A receipt in full is not conclusive evidence of payment, but it is a mere admission which is always susceptible of explanation in respect to the circumstances under which it was given.

and the purposes which it was intended to answer: *Montforton v. Bondit*, 1 U. C. R. 362; *Cuvillier v. Broune*, 4 U. C. R. 105.

An action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another: *Owston v. Grand Trunk R. W. Co.*, 28 Chy. 431.

The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.: Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C., in respect of such profit accrued to him prior to his death: *Phillips v. Homfray*, 24 Ch. D. 439, discussed, and regarded as decisive in the present case. Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of, property of a tangible character passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different: *Leslie v. Calvin*, 9 O. R. 207.

Payments made by a purchaser on account of moneys payable to the vendor under the contract, to the third person who is assignee of or interested in the vendor's contract can, on total failure of the consideration, be recovered by the purchaser in an action for money had and received to his use from such third person, though he was not a party to the contract: *Aberaman Ironworks v. Wickens* (L. R. 4 Ch. 101), distinguished and explained. *Fleming v. Loe*, 70 L. J. Ch. 805; (1901), 2 Ch. 594; 85 L. T. 480; 50 W. R. 55.

ACTION ON AN ACCOUNT STATED.

The plaintiff must prove an absolute acknowledgment; a qualified acknowledgment is not sufficient: *McKay v. Grinley*, 30 U. C. R. 54; *Green v. Burtch*, 1 U. C. C. P. 313.

On the dissolution of a partnership, the parties signed a statement shewing a certain amount as due to the plaintiff for his share and declaring that "for the sake of peace and quiet and to avoid friction and bother," the plaintiff waived examination of the firm's books and agreed that the amount so stated should be deemed to be the amount payable by the defendants to the plaintiff: Held, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability. In an action for the amount of the balance, the defendant alleged that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely shewing what would be payable to him upon the collection of the outstanding debts owing to the firm:

Held, that as the effect of the alleged collateral agreement was to vary and annul the terms of the written instrument they could not be proved by parol testimony: *Jackson v. Drake, Jackson & Helmcken*, 37 S. C. R. 315.

An I O U is evidence of an account stated with the person who holds it; and if another person was meant, the defendant must prove it: *Fischenmayer v. Adcock*, 16 M. & W. 449.

In support of an account stated as set out in the declaration, the following memorandum was put in evidence: "\$300—Good to T. T. to the amount of \$300 to be paid to him or his order at E. C.'s mill in the township of Elma in the county of Perth, in lumber at cash price; signed, J. C., sen., J. C." Held, a sufficient acknowledgment of debt or liability and a promise to pay, and that it imported a sufficient consideration to sustain the account stated in the declaration: *Tyke v. Cosford*, 14 U. C. C. P. 64. Evidence of: A document which acknowledges a sum to be due at its date, but not payable until a future day, is evidence of an account stated: *Armitage v. Vivian*, 2 M. L. R. 360 (Man.). A promissory note given to an agent upon a settlement of accounts is evidence of an account stated with his principal, when the fact of agency was known to the other party: *Rhodes v. Executors of Crawford*, 1 U. C. R. 257. To support an account stated, it is necessary to shew a mutual understanding between the plaintiff and defendant as to a balance struck or sum admitted: *Larder v. Farquhar, et al.*, 20 N. S. D. (8 R. & G.) 454; 9 C. L. T. 233 (N.S.).

Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill. In order to open a settled account it is necessary to particularize special errors in the account: *Clark v. Hamilton*, 5 Terr. L. R. 178.

Interest is not chargeable upon such an account unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or upon an account indorsed shewing that the parties have themselves in adjusting their accounts allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages: *George v. Green*, 13 O. L. R. 189, 14 O. L. R. 190.

An account stated by an executor of a debt due by his testator never before ascertained or determined, is sufficient to charge the executor as a substantive debt, without any express promise to pay: *Watkins v. Washburn*, 2 U. C. R. 291.

ACTION AGAINST INNKEEPERS.

Generally, an action *ex contractu* for some breach of the contract, express or implied, which the innkeeper has entered into, or

professes to be ready to enter into with his guest in relation to his personal entertainment: *Newcombe v. Anderson*, 11 O. R. 665.

An innkeeper at common law is answerable for the safe keeping of the goods of a guest, but it is only in respect of the goods of a guest that he is so liable.

The common law liability has been limited by R. S. O. 1897, c. 187, s. 3; 1904, c. 10, s. 44; 1907, c. 23, s. 17.

By section 2 of that Act an innkeeper has a lien on the baggage and property of his guest for accommodation furnished, and has the right to sell the same after three months on giving one week's notice by advertisement. By section 44, chapter 10, 1904 (Ont.), an innkeeper has also a lien on horses and vehicles.

British Columbia, R. S. 1897, c. 98.

Manitoba, R. S. 1902, c. 75; 1905, c. 19.

Accidents by Fire in Hotels.

Ontario, R. S. 1897, c. 264; 1899, c. 18; 1900, c. 44; 1909, c. 26, s. 20.

Under R. S. O. 1897, c. 245, s. 122, where a person who is intoxicated is supplied with liquor, causing death, an action lies against the tavern-keeper supplying the liquor: see *Crane v. Hunt*, 26 O. R., at page 643.

Where a traveller is shewn to have come to an inn as a guest, and to have stayed there six weeks paying for his board by the week two days in advance: Held, that if dismissed abruptly without cause he has a right of action against the landlord on the common law relation of innkeeper and guest. To put an end to this relation the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term: *Whiting v. Mills*, 7 U. C. R. 450. An innkeeper has the sole right to select the apartment for a guest, and if he find it expedient to change it and assign him another; he cannot be treated as a trespasser for entering to make the change: *Doyle v. Walker*, 26 U. C. R. 502. A guest who has been received loses the right to be entertained if he neglect or refuse to pay upon reasonable demand: *Ib.* An innkeeper held not liable for neglecting to warn his guest of a fire breaking out in the building: see *Hare v. Henderson*, 43 U. C. R. 571.

Negligence of innkeeper: *Palin v. Reid*, 10 A. R. 63.

Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. *Groves v. Lord Wimborne* (1898), 2 Q. B. 402, applied. The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape, and

having made no objection), is not applicable where the injury arises from a breach of a statutory duty: *Baddeley v. Earl Granville*, 19 Q. B. D. 423, applied. The fact that the guest delayed his exit in order to rescue a fellow guest, and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence." Whether the plaintiff did anything which a person of ordinary care and skill would not have done in the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident, was for the jury to decide: *Love v. New Fairview Corporation*, 10 B. C. R. 330.

Lynar v. Mossop, 36 U. C. R. 230; *Walker v. Sharpe*, 31 U. C. R. 340.

The common law liability of an innkeeper to receive and lodge a guest as a traveller, and the person who has been received at an inn as a traveller, does not necessarily continue to reside there in that character. If the guest has lost the character of traveller, the innkeeper is not bound to supply him with lodging, but is entitled to give reasonable notice to require him to leave: *Lamond v. Richard* (1897), 1 Q. B. 541.

The lien which the law gives an innkeeper on the goods of his lodgers is to be interpreted strictly, and the Judge cannot enlarge it even for equitable causes. An innkeeper cannot hold the goods of guests as security for medical expenses and advances of money made by him to his guest to enable him to continue his journey. A commercial traveller cannot pledge his employer's samples as security for his personal debt: *Gilmour v. Snow*, Q. R. 27 S. C. 39.

Lien on wearing apparel of servant limited: *Ont. Stats.* 1910, c. 26, sec. 9.

Liability of, for want of fire escape: *Hagle v. Laplante*, 1 O. W. N. 413.

The responsibility of an innkeeper for the safety of a traveller's property begins the moment the relation of guest and innkeeper arises. That relation arises as soon as the traveller enters the inn with the intention of using it as an inn and is received on that basis by the innkeeper and this is so notwithstanding the fact that some one other than the particular traveller is to pay for the accommodation received by him in the inn: *Wright v. Anderson*, 78 L. J. K. B. 165; (1909), 1 K. B. 209; 100 L. T. 123; 25 T. L. R. 156.

An innkeeper, the bedrooms in whose inn are occupied, is not bound to receive a guest who desires to sleep the night at the inn: *Broune v. Brandt*, 71 L. J. K. B. 367; (1902), 1 K. B. 696; 86 L. T. 625; 50 W. R. 654.

Overcoat lost in diningroom used by persons other than those sleeping at the inn (hotel)—liability of proprietor: *Orchard v. Bush* (1898), 2 Q. B. 284.

Commencement of relationship, negligence, notice, special place provided for leaving effects: *Fraser v. McGibbon*, 10 O. W. R. 54.

"Expressly" means that the bailor's intention must be brought to the mind of the bailee or his agent in some reasonable and intelligible manner, so that he may, if so minded, insist on the precautions specified therein.

The appellant a commercial traveller, took to the respondent's hotel a bag containing valuable jewellery which he handed, in accordance with long custom, to the respondent's servant, who knew him and his occupation. The bag was deposited in a place where it had frequently been placed on other visits of the appellant. It was stolen—that the respondents were not liable beyond 301: *Whitehouse v. Pickett*, 77 L. J. P. C. 89; (1908), A. C. 357; 99 L. T. 367; 24 T. L. R. 766.

LODGING-HOUSE KEEPER.

A person who carries on the business of a boarding-house keeper for reward is bound to carry it on with reasonable care, having regard to the nature and normal conduct of the business as known to the guest or as represented to the guest by him; and if by reason of a breach of that duty the luggage of the guest is lost, the boarding-house keeper is liable for the loss to the guest: *Scarborough v. Cosgrove*, 74 L. J. K. B. 892; (1905), 2 K. B. 805; 93 L. T. 530; 54 W. R. 100; 21 T. L. R. 754.

ACTION AGAINST PAWNBROKER.

By R. S. O., 1897, c. 188, s. 1, every person who takes or receives by way of pawn, pledge, or exchange any goods for the repayment of money lent thereon shall be deemed a pawnbroker within the meaning of that Act.

When goods are pawned with a pawnbroker, a written or printed memorandum must be given to the person pawning, containing a description of the goods, the amount advanced, the date, and names on presentation thereof and demand, entitled to the goods on payment of the pawnbroker's claim.

Provision is made in the statute for sale of goods, and for recovery of goods when illegally detained.

A pawnbroker under C. S. C. c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor: *Regina v. Adams*, 8 P. R. 462. Although the Court will not interfere with any bargain made by competent parties since the repeal of the usury laws for the payment of interest, still if any dispute as to such contract exists it is the duty of the Court to see that the parties to any agreement for payment of exorbitant interest clearly understood the bargain before effect will be given to it. Where,

therefore, on the loan of money it was agreed to pay at the rate of two per cent. a month in advance, and the lender in making up the account contended that the agreement being that it should be paid in advance was the same as two and one-half per cent. a month, and insisted upon his right to charge that sum; the Court directed the Master to allow at the rate of two per cent., the effect of the interest being payable in advance not having been explained to the borrower: *Teeter v. St. John*, 10 Chy. 85.

ACTIONS AGAINST CARRIERS.*

In Respect of Carriage of Goods.

Carriers may be of goods or of persons, or of both, and they may be carriers by land and by sea.

A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as see fit to employ him. He is bound at common law to receive and carry all goods reasonably offered to him, and for which the person bringing the goods is ready and willing and offers to pay reasonable hire and reward: *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372.

He is also an insurer of the goods against all accidents, except the act of God or the King's enemies, and whether the loss occurs by accident, robbery, violence, or the negligence of third persons.

A carrier may limit generally his business to certain goods, and is then not obliged to carry other goods: *Johnson v. Midland Ry. Co.*, 4 Ex. 367.

Where the carrier delivers a ticket or other notice to the person from whom he receives the articles, specifying the terms on which he agrees to carry, and the customer assents, or does not dissent, the terms of the notice will establish a special agreement, and will exclude the common law contract so far as it is varied by those terms.

If the customer in such a case declines the terms, and wishes to fix the carrier with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods: *Garton v. Bristol*, 30 L. J. Q. B. 273.

In an action for loss of or injury to goods, the plaintiff must prove: 1. That the defendant is a common carrier; 2. The delivery of the goods for conveyance and the contract, if special; 3. The loss or injury; 4. The damage.

In an action for refusal to carry, the plaintiff will have to prove, besides the defendant's character as a common

* See also "Negligence," post, for liabilities of Railway and other companies.

carrier, the tender of goods for conveyance and the refusal of the defendant to accept the goods for that purpose, although the plaintiff was then ready and willing to pay a reasonable reward in that behalf. The action is one of tort for refusal to perform a public duty, whereby the plaintiff has sustained special damage.

The plaintiff need not aver a strict tender of the fare; it is enough that he was ready to pay. But where the carrier has limited his liability unless a certain charge be paid, payment or tender of that charge must be proved: *Wylde v. Pickford*, 8 M. & W. 443.

The proper person to sue as plaintiff is the person in whom the property was vested when lost or damaged. Hence generally the consignee is the proper plaintiff.

The measure of damages is the market value of the goods at the time and place at which they ought to have been delivered; and if there is no market for the sale of such goods at the place, the jury must ascertain their value by taking their price at the place of manufacture, together with the cost of carriage and a reasonable sum for importer's profits: *Vickers v. Wilcocks*, 2 Sm. L. Cas. 805.

A common carrier is not liable for an injury to goods caused by an inherent latent defect in the goods themselves, the existence of which was unknown both to the sender and the carrier.

The question of liability is not affected by the fact that, in the course of the transit, the carrier's servant may have done some act contributing to the injury: *Lister v. Lancashire and Yorkshire Railway*, 72 L. J. K. B. 385; (1903) 1 K. B. 878; 88 L. T. 561; 52 W. R. 12.

By the Dominion Railway Act, passengers and goods must be conveyed on due payment of the toll, freight, or fare lawfully payable therefor. Tolls are provided for by the Act.

Every person aggrieved by any neglect or refusal to convey has an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company, or of its servants.

In spite of s. 246 (3) of Dominion Railway Act, 1888, a railway company may enter into a special contract for the carriage of goods and limit its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence: *Robertson v. G. T. R.*, 24 S. C. R. 611. See *Vogel v. G. T. R.*, 11 S. C. R. 612; *Cobban v. C. P. R.*, 26 O. R., at page 759; *Robertson v. G. T. R.*, 21 A. R. 204.

"Baggage" means not only personal baggage, such as every passenger is allowed to carry without extra charge, but also com-

mercial baggage: *Dixon v. Richelieu*, 18 S. C. R. 704, affirming 15 A. R. 647.

The responsibility of a railway company as carriers or warehousemen discussed: *Milloy v. G. T. R.*, 21 A. R. 404.

Provisions are made for interchange of traffic between companies. Connecting lines, misdelivery of goods: *Grant v. Northern Pacific R. W. Co.*, 22 O. R. 645, sustained on appeal, 21 A. R. 322.

Goods that are brittle or liable to injury must be safely packed by the consignor, or the carrier will not be liable for injury done to them in carrying if he has used due care: *Hart v. Barendale*, 16 L. T., N. S. 390.

Passenger's Luggage.

On this point see *Stewart v. London & N. W. Ry. Co.*, 3 H. & C. 135, where it was said that a carrier undertakes no responsibility in respect of the goods of a passenger beyond that which he undertakes with respect to the passenger himself. In other cases it has been ruled that a carrier of passengers is liable to the ordinary obligations of common carriers: *Stewart v. London* was overruled in *Cohen v. S. E. Ry. Co.*, 2 Ex. D. 253 C. A.

The rule may now be said to be that a carrier of passengers' personal luggage is liable to the ordinary obligations of common carriers. As to carrying merchandise as luggage, see *Belfast, etc., v. Keys*, 9 H. L. C. 556.

A railway company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, etc., even when these are packed with the baggage for which they are liable. When goods remain at the station at which a passenger alights, but it does not appear that the railway company has charged, or is entitled to charge for storage, the company is not liable as warehousemen: *McCaffrey v. The Canadian Pacific Railway Co.*, 1 M. L. R. 350 (Man.). If a chartered ship be disabled by excepted perils from completing the voyage, the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight: *Owen v. Outerbridge*, 26 S. C. R. 272. When a shipper stores goods from time to time in a railway warehouse, loading a car when a carload is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers, but of warehousemen, and in case of their accidental destruction by fire the shipper has no remedy against the company: *Milloy v. Grand Trunk R. W. Co.*, 21 A. R. 404; reversing 23 O. R. 454.

It is the duty of a railway company to have luggage ready for delivery on the platform at the usual place of delivery until the

owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time: *Vineberg v. G. T. R. Co.*, 13 A. R. 93. A railway company are not liable for merchandise carried by a passenger as luggage for which no extra charge is paid: *Shaw v. Grand Trunk R. W. Co.*, 7 U. C. C. P. 493. The plaintiff purchased from an agent of the defendant company at Ottawa what was called a land seeker's ticket, the only kind of return ticket issued on the route for a passenger to Winnipeg and return, paying some \$30 less than the single fare each way. The ticket was not transferable, and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding \$100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read or explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and the plaintiff's luggage valued at over \$1,000 caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the luggage. Held, reversing the judgments in 15 A. R. 388, and 14 O. R. 625, that there was sufficient evidence that the loss of the luggage was caused by the defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of the plaintiff, she was not bound by them and could recover her loss from the company: *Bate v. Canadian Pacific R. W. Co.*, 18 S. C. R. 697. Plaintiff travelling on a first-class travelling ticket on defendant's railway from Chatham to Toronto, took a travelling bag with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge of any of the defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car to retain the place, and on his return from the refreshment room it was gone: Held, that the defendants were liable for the loss. Remarks on effect of custom of checking luggage: *Gamble v. Great Western R. W. Co.*, 24 U. C. R. 407. The plaintiff was a passenger on one of the defendants' cars, occupying a sleeping berth. Before going to sleep he had undressed himself, and had put his pocket book containing his money in his trousers' pocket, rolling up his trousers and putting his braces around them, and then placed them under his pillow next the wall. When he was called, before arriving at his place of destination, he discovered that his pocket book and money were gone. No negligence in the defendants was shewn: Held, that no liability attached to the defendants: *Stern v. Pullman Car Co.*, 8 O. R. 171. In an action against a common carrier for the loss of goods a jury

is not justified in giving a verdict of greater damages than the value of the goods actually proved to have been contained in the case, and the maxim *omnia præsumentur contra spoliatorem* will not apply unless it is shown that the goods were in the defendant's possession, and that he had an opportunity but omitted to show their value: *Smith v. Lunt*, 2 Pug. 64 (N.B.). Where dogs were delivered to an express company to be carried to the city for the purpose made known to the company of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits: *Kennedy v. American Express Company*, 22 A. R. 278. An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make providing they are reasonable. An action by a rival company, which collected together small parcels, for the carriage of which it charges a rate much smaller than the defendants, an express company, did for similar parcels, packed them together in one large parcel and sought to compel the defendants at great loss to carry such parcel by size and weight rate, was dismissed: *Johnson v. Dominion Express Company*, 28 O. R. 203. A person engaged to transport goods for hire is not by virtue of such engagement merely a common carrier: *Benedict v. Arthur*, 6 U. C. R. 204.

An express company that formally undertakes to forward goods is not a mere agent or intermediary between the shipper and the actual carriers. It is itself a common carrier, and, as such, liable for the safe carriage and delivery of the goods, and the onus of proof is on it to shew that loss of them is due to irresistible force or the act of God: *Dominion Express Co. v. Rutenberg*, Q. R. 18 K. B. 50.

That freight is payable according to mode of computation at place of lading: *Melady v. Jenkins*, 13 O. W. R. 439.

Carriers by Water.

Statutory Rules as to Liabilities of Carriers by Water are contained in sections 961 to 966 inclusive of R. S. C. c. 113, The Canada Shipping Act. These sections cover the subjects of conveyance of passengers, responsibility for goods, loss or damage by fire, responsibility as to gold or silver and for baggage of passengers.

Special condition on ticket: *Marriott v. Yeoward* (1909), 2 K. B. 987.

The liability of the carrier as regards articles carried on the person or in the passenger's personal custody is the same as that towards

the passenger, namely, to take reasonable care: *Smitton v. Orient, &c.*, 96 L. T. 848.

Delay in delivering cargo in reasonable time: *Bauld v. Smith*, 40 N. S. R. 294.

Carriers by water not liable for the loss of jewels of passengers the nature and value of which have not been declared to them: *Ivers v. R. and O. Navigation Co.*, Q. R. 35, S. C. 344. Terms of bill of lading do not empower delivery at pleasure nor shield from carriers' own negligence: *Courian v. R. & O. Nav. Co.*, 6 E. L. R. 229.

Letter Carriers.

Postmaster-General is not a common carrier, but postmasters are liable for their own personal negligence.

The Post Office Act, R. S. C. c. 66, enacts as follows:—

139. In any action, suit, or proceeding, against any postmaster or other officer of the post office of Canada, or his sureties, for the recovery of any sum of money alleged to be due to the Crown as the balance remaining unpaid of moneys received by such postmaster or officer, by virtue of his office, a statement of the account of such postmaster or officer showing such balance, and attested as correct by the certificate and signature of the accountant of the post office of Canada, or of the officer then doing the duties of such accountant, shall be evidence that such amount is so due and unpaid as aforesaid, and in every such suit judgment shall be rendered for double the amount appearing by such account to be so due to the Crown by the defendant, but nothing herein contained shall be construed to prevent the provisions of the Consolidated Revenue and Audit Act from applying to such postmaster or officer.

Passenger Carriers.

Carriers of passengers are not insurers of the person, and are responsible only for want of due care: *Christie v. Griggs*, 2 Camp. 81.

If a company allege that the passenger has not complied with the conditions of a by-law, they must prove that they have strictly observed the by-law on their part. If in consequence of wrongful delay or erroneous information of carrier, passenger is reasonably obliged to hire another conveyance or stop a night on the road, the expenses may be recovered, but the jury cannot give general damages for loss of time, trouble, etc.: *Hobbs v. L. & S. W. R. Co.*, L. R. 10 Q. B. 111.

The contract between a person buying a railway ticket and the company implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels; and if he is put off a train for non-delivery of it, the company is not liable

to an action: *G. T. R. v. Beaver*, 22 S. C. R. 498. Ticket "via direct line" discussed, and authority of a ticket seller to make representations binding on the company upheld: *Dancey v. G. T. R.*, 20 O. R. 603.

A passenger rightfully travelling on his ticket is not bound to leave the train at the conductor's order, at the peril of not being able to recover damages for an assault committed in expelling him by force: *S. C.*, 19 A. R. at page 672.

Special conditions on a passenger's railway ticket must be brought to notice of passenger, or he will not be bound by them: *Bate v. C. P. R.*, 18 S. C. R. 697, reversing 15 A. R. 388.

The following provision has been made as to Stop-over Tickets, R. S. C. c. 38, s. 9:—

Every passenger who presents a single journey ticket upon a right of train within the time for which the conditions printed upon such stopping ticket and the date shows such ticket to be good for use, may apply to the conductor of such train to have the privilege of stopping over granted, and the time for which the ticket is valid extended.

2. Such privilege and extension of time shall be granted by such conductor on tickets purchased at railway ticket offices in Canada, from one place in Canada to another, or from a place in Canada to a place in the United States.

3. No such passenger shall be entitled to have such time extended for more than two days for every fifty miles of distance to be travelled in Canada.

Semble, that in this country it is not the law that a passenger rightfully travelling upon his ticket is bound to pay fare wrongfully demanded or to leave the train on the conductor's order at the peril of not being able to recover damages for an assault committed in expelling him by force. The United States cases on the subject considered and not followed. Judgment in 20 O. R. 603 (*supra*) varied: *Dancey v. Grand Trunk R. W. Co.*, 19 A. R. 664. Held, that by the sale of a railway ticket, the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at intermediate station. *Craig v. Great Western R. W. Co.*, 24 U. C. R. 509, *Briggs v. Grand Trunk R. W. Co.*, 24 U. C. R. 51, and *Cunningham v. Grand Trunk R. W. Co.*, 9 L. C. Jur. 57, 11 L. C. Jur. 107, approved and followed. *Coombs v. The Queen*, 4 Ex. C. R. 321, 26 S. C. R. 13.

PART II.

TITLE II.

ACTIONS ON WRONGS INDEPENDENT OF CONTRACT.

ACTION FOR NEGLIGENCE.

The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do; and an action may be brought if thereby mischief is caused to another person not intentionally: *Blyth v. Birmingham*, 11 Ex. 781. Where the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care: *Scott v. London & St. Catharine Docks Co.*, 3 H. & C. 596. Quoted in *Sangster v. T. Eaton Co.*, 21 A. R. 624.

To maintain an action for damages through negligence it is necessary to shew by weighty, concise and consistent presumptions, arising from facts proved in case of want of direct evidence, that the accident was actually caused by the positive fault, imprudence or neglect of the defendant: *Montreal Rolling Mills Co. v. Corcoran*, 26 S. C. R. 595.

Although the mere happening of an accident is not in general *prima facie* evidence of negligence, and the plaintiff is bound to give some evidence in support of the defendant's negligence, yet the accident may be of such a nature that negligence must be assumed from the unexplained fact of the accident happening: *Byrne v. Boadle*, 33 L. J. Ex. 13.

Where a statutory duty is imposed on a company, the company are liable for any damage caused to the property of another in consequence of the negligent performance of that duty, and the company cannot avoid liability by shewing that the negligence was that of an independent contractor, employed by the company: *McRury v. Dominion Coal Co.*, 40 N. S. R. 89; *McLean v. Dominion Coal Co.*, *ib.* 90n.

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no

direct fault or negligence proved against the defendant, and the actual cause of the accident is purely a matter of speculation or conjecture: *Canada Paint Company v. Trainor*, 28 S. C. R. 352.

Culpable negligence means actionable negligence. Where there is evidence of negligence it is misdirection to tell the jury that there is no culpable negligence, though the question of negligence is left to them: *McPherson v. City of St. John*, vol. 32, 423 (N.B.).

The fact that an accident has occurred is not of itself evidence of negligence; the plaintiff must give affirmative evidence of negligence on the part of the railway company, and if the fact of negligence is left doubtful, the defendants are entitled to a verdict: *Falconer v. European and North American Ry. Co.*, 1 Pug. 179 (N.B.).

If the principal cause of an accident is the want of care of the victim, that does not take away all recourse against the party who has contributed to the accident by his negligence. 2. The only effect of the victim's carelessness is to reduce the amount of damages which he may be awarded. 3. It is not necessary in order to establish negligence in a party that the law should have imposed upon him the duty of doing what he has not done; it is sufficient that ordinary prudence imposed the duty upon him: *Jess v. Quebec and Lewis Ferry Co.*, Q. R. 25 S. C. 224.

In an action founded on negligence, specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence: *Spencer v. Alaska Packers' Association*, 35 S. C. R. 362.

Where a chattel is lent gratuitously for beneficial use by the borrower, it is the duty of the lender to communicate to the borrower any defect in it with reference to the use for which the loan is made, of which the lender is aware, and if he wilfully or by gross negligence omits to do so he is liable for injury resulting from such defect to the borrower while using the chattel. *Blackmore v. Bristol and Exeter Railway* (27 L. J. Q. B. 167; 8 E. & B. 1035) and *McCarthy v. Young* (30 L. J. Ex. 227; 6 H. & N. 329), approved. *Coughlin v. Gillison*, 68 L. J. Q. B. 147; (1899) 1 Q. B. 145; 79 L. T. 627; 47 W. R. 113.

To entitle a plaintiff to recover from a defendant, on the ground of estoppel, a loss occasioned through culpable neglect on the part of the defendant, the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate, direct, or real cause of the loss: *Longman v. Bath Electric Tramways*, 74 L. J. Ch. 424; (1905) 1 Ch. 646; 92 L. T. 743; 53 W. R. 480; 12 Manson 147; 21 T. L. R. 373.

Trespassers. Held, that the proprietor had no responsibility towards third parties who might come upon his premises without invitation or without having business to transact there: *Wiggins v. Semi-Ready Clothing Co.*, 23 Occ. N. 117.

A trespasser or bare licensee injured through negligence may maintain an action: *Sivert v. Brookfield*, 35 S. C. R. 494.

Carrier. In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger: *Nightingale v. Union Colliery Co. of British Columbia*, 35 S. C. R. 65.

The action for damages for injury caused by negligence of a common carrier of passengers is *in tort*. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no danger or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law and requires not the aid of contract to support it. Corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them: *Kenney v. Canadian Pacific R. W. Co.*, 5 Terr. L. R. 420.

Subsequent remedy or defect. In an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there is no other evidence of negligence, the case should be withdrawn from the jury: *Toll v. Canadian Pacific R. W. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 318.

Prospects of matrimony. In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman by reason of physical injuries, may be taken into consideration by a jury in estimating the damages: *Morin v. Ottawa Electric R. W. Co.*, 18 O. L. R. 209.

Mere conjecture insufficient. The question is whether the accident may be considered to be the "necessary," "legal," or "natural" consequence of the original wrongful act. Was it the natural or probable result of that act? Did it follow upon it in the ordinary course of events? In the absence of direct testimony there must be generally a great deal of mere opinion as to the cause of injury. Mere conjecture will not answer unless it be based on proved facts on which the opinion is based: *Wakelin v. London & S. W. R. Co.*, 12 App. Cas. 41; *Badcock v. Freeman*, 21 A. R. 633.

Causa efficiens. The *causa sine qua non* of an accident is not that on which depends the legal imputability of the accident; the liability depends not on that, but on the *causa efficiens*: *Gilmour v. Bay of Quinte Bridge Co.*, 20 A. R. at p. 281. See *Hamilton v. Pandorf*, 12 App. Cas. 518, ante p. 240. The proximate cause of an event must be understood to be that which in a natural and continuous sequence

attributed by any new cause produces that event, and without which the event would not have happened: *Forwood v. Toronto*, 22 O. R. at p. 351. "Proximate cause" discussed: *Prescott v. Connell*, 22 S. C. R. 93 p. 117.

In case of negligence it is not essential as in insurance cases that the proximate cause should alone be regarded. It is sufficient if an efficient cause of the thing complained of is found in some tortious act of the defendant. A plaintiff is not bound to prove negligence beyond reasonable doubt. *Per King, J.: Rennie v. The St. John City Ry. Co.*, vol. 31, 582 (N.B.).

The jury found that the fire originated from the defendant's engine but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway: Held, that the jury had found the plaintiff negligent and as such negligence was the proximate cause of the damage he could not recover: *Cairns v. Can. Nor. Ry. Co.* (1909), 2 Sask. L. R. 19; 9 Can. Ry. Cas. 306; 10 W. L. R. 39.

Res ipsa loquitur. A mere phrase, not a rule of law. Is only intended as a guide to the point in the evidence at which the burden of proof is shifted. Negligence consists of two elements—the burden of proving both of which originally rests upon the plaintiff, namely, the duty to take care and its breach. The maxim has nothing to do with the former; and in the case of the latter only determines that when the plaintiff has proved the duty, and also a certain condition, of things causing or conducing to the injury complained of he has proved enough to call for explanation by the defendant—in other words the burden of proof is shifted: *O'Brien v. Michigan Central R. R. Co.*, 1 O. W. N. 7.

The defence embodied in the maxim *volenti non fit injuria* is the same whether stated by a master against his servant or by a landlord against his tenant: *Cameron v. Young* (1907), S. C. 475.

Held, also, following *Baddeley v. Earl Granville*, 19 Q. B. D. 423, that the maxim *volenti non fit injuria* does not apply where an accident is caused by the breach of a statutory duty: *Rogers v. Hamilton Cotton Co.*, 23 O. R. 425.

On the trial of an action for damages in consequence of an employee of a lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risks of shunting," and that the death of the deceased was caused by defendants' negligence in shunting in giving the car too strong a push. Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim *volenti non fit injuria* had no application: *Smith v. Baker* (1891), A. C. 325, applied: *The Canada Atlantic Ry. Co. v. Hurdman*, 25 S. C. R. 205.

Respondent superior. **Respondent superior.** — Where an injury is occasioned to anyone by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim *respondent superior* prevails and the master is responsible: *Bartons-hill Coal Co. v. Reid*, 3 Macq., Sc. App. Cas. 266; *Crain v. Ryan*, 25 O. R. 524.

Acts of
third
parties

There is no duty imposed upon persons in dealings with others to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not in itself negligence in law. Judgment appealed from (27 Ont. App. R. 590) affirmed: *Imperial Bank of Canada v. Bank of Hamilton*, 31 S. C. R. 344.

Vis major.

Where fire destroyed his house, leaving walls dangerous, and defendant knowing the fact neglected to secure and support a wall or take it down, and some days after the fire it was blown down by a high wind and damaged plaintiff's house, defendant cannot shield himself under plea of *vis major*. Judgment appealed from (Q. L. R. 6 Q. B. 402) affirmed: *Nordheimer v. Alexander*, 19 S. C. R. 248.

Damages must not be too remote: see *Grinsted v. Toronto R. Co.*, 24 S. C. R. 570.

Contribu-
tory negli-
gence.

Contributory negligence rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the casual connection between the defendant's negligence and the accident which has occurred so that the latter's negligence can no longer be considered the true proximate cause of the injury: *Thomas v. Quartermaine*, 18 Q. B. D. 685, quoted in *Headford v. McClary Mfg. Co.*, 23 O. R. at page 342. Latter case sustained, 24 S. C. R. 291. In an action by Judge and jury to recover damages for negligence where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant. Although the Judge is entitled to hold negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either issue is proved. The question of proof is for the jury: *Morrow v. C. P. R.*, 14 C. L. T. 246. *Weir v. C. P. R.*, 16 A. R., specially distinguished. The doctrine of contributory negligence does not apply to an infant of tender age: *Merritt v. Hepenstal*, 25 S. C. R. 153. The issue respecting

contributory negligence has to be proved by the defendant: *Forwood v. Toronto*, 22 O. R. at page 359.

The onus of proving contributory negligence on the part of the plaintiff rested on the defendants in the first instance, and in the absence of evidence tending to that conclusion the plaintiff was not bound to prove the negative in order to entitle him to a verdict: *Wakelin v. London and South-Western R. W. Co.*, 12 App. Cas. 41. To prove contributory negligence it is necessary for the defendants to shew that the plaintiff could by the exercise of such care and skill as he was bound to exercise have avoided the consequence of the defendants' negligence: *Bell v. Winnipeg Electric Street R. W. Co.*, 24 Oec. N. 155.

Contributory negligence may be a defence to an action for damages suffered in consequence of a breach of a statutory duty. *Groves v. Wimborne* (1898) 2 Q. B. 419, and *Beven on Negligence*, pp. 633, 634, 643, and the cases there cited, followed: *Sreet v. Canadian Pacific R. W. Co.*, 18 Man. L. R. 334, 9 W. L. R. 558.

When a wagon is left standing in the highway the owner cannot defend himself by shewing that the person injured thereby was drunk: *Ridley v. Lamb*, 10 U. C. R. 354. Knowledge is not *per se* contributory negligence: *Gordon v. City of Belleville*, 15 O. R. 26. Intoxication.

In an action against a railway company for killing the plaintiff's horses by collision at a crossing, the weight of evidence went strongly to shew that the plaintiff was intoxicated and the accident caused by his own negligence and bad driving. The jury, however, found in his favour. The Judge who tried the case being dissatisfied with the verdict, and there being reason to believe that it arose from mistaken sympathy on the part of the jury for a poor man as against a railway company, the Court granted a new trial with costs to abide the event: *McGuinal v. Grand Trunk Railway Co.*, 33 U. C. R. 194.

MISCELLANEOUS INSTANCES IN WHICH LIABILITY FOR NEGLIGENCE HAS BEEN DISCUSSED.

Road companies, liability of: *Webb v. Barton Stoney Creek Road Co.*, 26 O. R. 343. The difference between misfeasance and non-feasance explained: *Same case at page 352*. An express contract between a landlord and his tenant that the former is to repair does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified landlord of disrepair: *Brown v. Toronto General Hospital*, 23 O. R. 599. Landlord and tenant.

A person who lets part of his land, retaining other part, is bound to take reasonable care in the user of the part retained not to cause damage to the tenant in his occupation of the part let:

Margroves, Aronson & Co. v. Hartop, 74 L. J. K. B. 233; (1905) 1 K. B. 472; 92 L. T. 414; 53 W. R. 262; 21 T. L. R. 226.

A landlord is not liable to his tenant for personal injuries caused by the defective condition of the demised premises unless the landlord has agreed to repair the premises and has received notice of the want of repair: *Tredway v. Machin*, 91 L. T. 310; 53 W. R. 136; 20 T. L. R. 726.

The wife of a tenant injured in consequence of the defective condition of the premises, which the landlord has promised to repair, has no cause of action against the landlord. The wife is not in a better position to recover damages than a customer or guest: *Cavalier v. Pope*, 75 L. J. K. B. 609; (1906) A. C. 428; 95 L. T. 65; 22 T. L. R. 648.

**Motor
vehicles.**

Having regard to the terms of 6 Edw. VII. c. 46 (O) (an Act to regulate the speed and operation of motor vehicles on highways), which casts the onus on the defendant when his motor has occasioned any violation of the Act, there was enough evidence to support the findings. *Semble*, that under the Act, the chauffeur is to be regarded as the *alter ego* of the proprietor and the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own: *Mattei v. Gillies*, 16 O. L. R. 558, 11 O. W. R. 1083; *McIntyre v. Coote*, 19 O. L. R. 9.

Contractor

While, as a general rule, the negligence of a contractor prudently selected is not the negligence of those who employ him, this principle is subject to two exceptions: (1) Where by the terms of the contract, control or supervision, with power to direct changes in its execution, is reserved to the employer so that the work may be regarded in a sense as the joint operation of both; (2) where the other principle applies whereby the employer is obliged both by common law and statute to have his works suitable for the operations to be carried on in them with reasonable safety. *Daniel v. Metropolitan Ry. Co.*, L. R. 5 H. L. 61; *Howe v. Finch*, 17 Q. B. D. 187, and *Moore v. Gimson*, 5 Times L. R. 177, distinguished. *McKeegan v. Cape Breton Coal, etc., Co.*, 40 N. S. R. 566.

Valuator.

The paid agent of a loan society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the society for a loss sustained by them by reason of a false report of such agent. *Silverthorne v. Hunter*, 5 A. R. 157, distinguished: *Hamilton Provident and Loan Society v. Bell*, 29 Chy. 203.

**Police
officer.**

A police officer is not the agent of the municipal corporation which appoints him to the position, and if he is negligent in performing his duty as a guardian of the public peace the corporation is not responsible: *McLeave v. City of Moncton*, 32 S. C. R. 106.

An agent who invests money for his principal without taking ^{proper} ~~any~~ proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby. The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land: *Lowenburg, Harris & Company v. Wollen*, 25 S. C. R. 51.

The Postmaster-General, being under no liability to his bailors ^{for property} ~~for property~~ for property bailed to him as Postmaster-General, cannot on behalf of the bailors recover for the loss of the property bailed, the loss being caused by the negligence of a stranger. *Claridge v. South Staffordshire Tramway Co.*, 61 L. J. Q. B. 503; (1892) 1 Q. B. 422, followed. *The Winkfield*, 49 W. R. 685.

An agister is not an insurer; he is bound to take reasonable ^{Agister.} ~~Agister.~~ care, and is liable for injury caused by want of such care; *Pearce v. Sheppard*, 24 O. R. 167. Liability of Ontario Commissioners for public park for not keeping fence in repair: *Graham v. Commissioners for Queen Victoria Niagara Falls Park*, 16 C. L. T. 336. Liability of municipalities to repair buildings in public parks: *Schmidt v. Town of Berlin*, 26 O. R. 54. Defective sidewalk. *Durochie v. Cornwall*, 23 O. R. 355, affirmed 24 S. C. R. 301. The question whether a highway is out of repair is a question for the jury. (See also ^{Highway.} ~~Highway.~~ *Nuisance*.) *Durochie v. Cornwall*, followed; *Ferguson v. Southwold*, 27 A. R. 66. Ontario Statute is as follows: "All actions against municipal corporations for damages in respect of injuries sustained through the non-repair of streets, roads, or sidewalks, shall hereafter be tried by a Judge without a jury, and the trial shall take place in the county in which the road, street, or sidewalk is constructed." Notice under Ontario Act, want of, must be set up in pleading: *Longbottom v. Toronto*, 16 C. L. T. 87.

It appeared that the city was not prejudiced by the want of notice: Held, that the street was out of repair, so as to render the city liable to the plaintiff; and that, under the circumstances, the plaintiff had shewn sufficient excuse for not giving the notice. *O'Connor v. City of Hamilton*, 10 O. L. R. 536, distinguished: *Morrison v. City of Toronto*, 12 O. L. R. 333, 7 O. W. R. 547, 607.

Held, that when the normal condition of a sidewalk is disturbed, ^{Sidewalk.} ~~Sidewalk.~~ it is the primary duty of a municipality to see that in its altered state it is kept in proper repair, and in a busy and much frequented place in excellent repair; and that when the source of danger has existed in a crowded street of a city for two weeks or even somewhat less, notice of the want of repair and of dangerous condition will be attributed to the authorities: *Gignec v. City of Toronto*, 7 O. W. R. 596.

See as to a street crossing: *Drennan v. Kingston*, 23 A. R. 406. Damages caused by negligent construction must be borne in case of drainage improvements by those assessed: *Sombra v. Chatham*, 18 A. R. 252. Contractor negligently leaving obstacle on highway causing accident is liable: *Howarth v. McGugan*, 23 O. R. 396.

Notice of
action

A notice of action to a municipal corporation in respect of a claim arising out of a defective sidewalk is sufficient if it states the cause of the accident, together with the name of the street, and the particular side of the street, and reasonable information as to locality, so as to enable the corporation to investigate. It is not necessary to mention the exact locality: *McQuillan v. Town of St. Mary's*, 31 O. R. 401. Where an object is left over night on the highway unlighted and unguarded (in this case a building in process of removal) which is calculated to frighten horses, and by which a horse is frightened and an accident results; and where the municipality, though having notice, have taken no precautions to warn travellers, they are liable in the absence of contributory negligence; but are entitled to be indemnified by the person who placed the obstruction on the highway: *Rice v. Town of Whitby*, 28 O. R. 598. See S. C. 25 A. R. 191.

A municipal corporation invested with statutory powers to develop or manufacture a dangerous substance, e.g., inflammable gas, is not liable in the same way as an individual without proof of negligence, for damages occasioned by the escape or explosion of such substance. *Fletcher v. Rylands*, L. R. 1 Ex. 265, L. R. 3 H. L. 330, distinguished. *Purmal v. City of Medicine Hat*, 7 W. L. R. 437, 1 Alta. L. R. 209.

Mercantile
agency

Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence, or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. See Q. L. R. 3 S. C. 345: *Cossette v. Dun*, 18 S. C. R. 222. The defendant hired by the day the general servant and horse and waggon of another company for use in its business, and while so hired the servant in carrying a load of glass knocked a man down and seriously injured him: Held, reversing the judgment appealed from (26 Ont. App. R. 63) that the defendant was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired and not that of the defendant: *Consolidated Plate Glass Co. v. Caston*, 29 S. C. R. 624.

Stranger's
servant.

Mortgagee

A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained for

the goods had he acted with a proper regard for the interests of the mortgagor: *Rennie v. Block*, 26 S. C. R. 356.

Bailment—Stablekeeper—Injury to horse—Liability of keeper for negligence: *Templeton v. Waddington*, 14 M. L. R. 495.

An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury find that he has acted negligently and disregarded his duty; and it is no misdirection to tell the jury that the low price obtained is evidence to go to them of negligence: *Cull v. Wakefield*, 6 O. S. 178.

A tradesman's teamster sent out to deliver parcels went to his supper before completing his delivery. He afterwards started to finish his work, and in doing so ran over and injured a child: Held, affirming the decision appealed from (33 N. B. Rep. 91) that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to his master's store and made a fresh start: *Merritt v. Hepenstal*, 25 S. C. R. 150. In a suit against the sheriff and an execution creditor in respect of an alleged irregular levy under writ of execution, the sheriff is not obliged to interplead, but may be properly joined in a defence with the execution creditor. A solicitor advising his client according to the established jurisprudence of the Court in which proceedings are taken is not guilty of actionable negligence, although the decision upon which he relied in giving the advice may be subsequently overruled: *Taylor v. Robertson*, 31 S. C. R. 615.

An action on the case lies in favour of a sheriff against a bailiff for negligence for allowing a prisoner to escape in consequence of which the sheriff is sued by the creditor, and a verdict recovered against him for nominal damages; and *semble*, that in such an action the sheriff is allowed to recover both the costs of the action against himself and his own costs, although no notice of that action had been given to the bailiff by the sheriff, the bailiff not being concluded by the former verdict if he had no opportunity of defending in the sheriff's name: *Ruttan v. Shea*, 5 U. C. R. 210. Under the plea of not guilty the bailiff can only prove that he was not guilty of the negligence. He cannot give in evidence any special contract of service. The proper measure for damages being the pecuniary value of the custody at the moment of escape: *McRae v. Dunlop*, 3 R. & G. 315 (N.S.). *Quære*, Whether in an action for an escape evidence of the admission of the judgment debtor of his ability to pay the debt was properly rejected: *Kelly v. Jones*, 2 All. 465 (N.B.).

The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of the master and servant, sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child.

there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf: *File v. Unger*, 27 A. R. 468. Where, in an action against a father to recover damages for acts of his infant son, there is evidence that the acts were done by accident without malicious intention, while the child was playing with the victim of the accident, his habitual playmate, under the eyes of the latter's mother, at a time when his parents had reason to believe that he was sufficiently watched and guarded, and there is also evidence that the child who did the wrong, although unruly, had no evil instincts, and had been properly brought up, there is proof sufficient to establish that the father could not have prevented the acts complained of, and, therefore, that he is not liable therefor: *Deschamps v. Berthiaume*, Q. R. 30 S. C. 135.

Snow.

There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling: *Lazarus v. City of Toronto*, 19 U. C. R. 9. A person sending goods to be warehoused has a right to expect that the building in which they are placed shall be reasonably fit for the purpose, but he has no right to expect more than ordinary and average care in that respect, and it is only in the absence of such care on the warehouseman's part that he will be liable. The fact of the building having fallen from a defect in the foundation is not conclusive evidence against the warehouseman, for that might happen without any negligence on his part: *Wilmot v. Jarvis*, 12 U. C. R. 641.

Ware-
houseman.

Physician
or surgeon.

Where, in an action for negligence as a surgeon, the defendant's counsel in addressing the jury relies on his client's skill as a surgeon, he cannot afterwards object on a motion for a new trial, that there was no evidence that he was a surgeon: *Kelly v. Dow*, 2 All. 435 (N.B.). An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year of the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated: Held, that the action was barred under the Ontario Medical Act, R. S. O. 1897, c. 176, s. 41. Infancy does not prevent the running of the statute: *Miller v. Ryerson*, 22 O. R. 369. In an action by husband and wife for negligence of defendants' surgeons in treatment of the wife, the evidence was of a weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not, while the evidence offered on behalf of defendants was of the most favourable character to them: Held, that on the plaintiff's counsel declining to take a non-suit, the Judge was right in directing the jury to find for defendants, as in also refusing him the right to address the jury on his whole case: *Storey v. Veach*, *Anderson v.*

Walker, Thackeray v. Askin, 22 U. C. C. P. 164. Where the evidence is as consistent with the absence as with the existence of negligence the case should not be left to the jury: *Jackson v. Hyde*, 28 U. C. R. 294. In an action against a medical practitioner for malpractice, the plaintiff must prove not only that there was negligence or want of skill on the part of the defendant, but also that the plaintiff was injured thereby: *McQuag v. Eastwood*, 12 O. R. 402. It is not admissible to ask medical witnesses on the cross-examination what books they consider best upon the subject in question, and then to read such books to the jury; but they may be asked whether such books have influenced their opinion: *Brown v. Shepherd*, 13 U. C. R. 178. The relationship of a medical man to his patient is one of trust and confidence, and any settlement made through him in consequence of advice given *scilicet fide* will be set aside: *Rowe v. Grand Trunk R. W. Co.*, 16 U. C. C. P. 500.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor and deducted from his demand: *Synod v. De Blaquiere*, 27 Chy. 536, 550 (n). Affirmed by the Supreme Court, Cassel's Dig. 539. See *Prentice v. Consolidated Bank*, 13 A. R. 69; see *Ryan v. McConnell*, 18 O. R. 409. An action for injury to the person now survives to the executor of the plaintiff. (R. S. O., c. Survival, 110, ss. 9, 10, 11): *Mason v. Peterborough*, 20 A. R. 683. Examination *de bene esse* of husband in an action under Lord Campbell's Act (R. S. O., c. 135), abated by his death, may be read in a subsequent action by widow: *Erdman v. Walkerton*, 20 A. R. 444, affirmed 23 S. C. R. 352.

An action for damage by reason of the death of a person can be maintained under R. S. O. 1897, c. 166, s. 8, by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased: *Lumpman v. Township of Gainsborough*, 17 O. R. 191.

NEGLIGENT DRIVING OF CARRIAGES.

A master is not answerable for the wilful and malicious act of his servant: *M'Manus v. Crickett*, 1 East 106. Where the injury is the result of mere accident, no action lies. To maintain an action, the act must have been wilful or the result of negligence: *Holmes v. Mather*, L. R. 10 Ex. 261. In order to subject the master to damages it must appear that there has been something to blame on the part of his servant, and he is blameable if he has not exercised the best and soundest judgment on the subject: *Jackson v. Toller*, 2 Stark. 39.

Occupant of carriage. The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage. Where, therefore, the hirer of a carriage allows one of his friends to drive and an accident results from the latter's negligence, the former cannot recover: *Flood v. Village of London West*, 23 A. R. 530.

Horses, damage to. In an action for damages for injury to a verandah on a street by runaway horses, the question of negligence is for the jury, but what facts may by them be considered is a question of law: *Sandilands v. Bathgate*, 9 L. J. 328. It is not negligence *per se* for the driver of a horse of a quiet disposition standing in the street, to let go the reins while he alights from the vehicle to fasten a head weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted: *Sullivan v. McWilliam*, 20 A. R. 627.

The mere fact that a horse while being driven along the highway has been frightened by the whistle of a steam engine used by the defendants for the purpose of their lawfully operated waterworks is not sufficient to make them responsible for damages resulting from the horse having run away. Some positive evidence of negligence in the use of the whistle must be given, or at least some evidence that its use might be expected to cause such an accident so as to cause it to be a nuisance to the highway: *Roe v. Village of Lucknow*, 21 A. R. 1.

Runaway horse. The plaintiff while walking on a sidewalk was knocked down and injured by a runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away; that the sleigh upset, the occupants were thrown out, and that the horse ran on the sidewalk and the accident occurred: Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant. *Mazoni v. Douglas*, 6 Q. B. D. 145, discussed; *Crawford v. Upper*, 16 A. R. 440.

Nervous shock. Damages for injuries resulting from a nervous shock caused by fright may be recovered in an action for negligent driving although there may be no actual physical impact upon the plaintiff's person: *Victorian Railways Commissioners v. Coultas* (57 L. J. P. C. 69; 13 App. Cas. 222), discussed and not followed: *Dulieu v. White*, 70 L. J. K. B. 837; (1901), 2 K. B. 669; 85 L. T. 126; 50 W. R. 76.

Sow. The finding of the jury that the sow was likely to cause the horse to shy, took the case out of the principle of *Cox v. Burbidge*

(32 L. J. C. P. 89; 13 C. B. (N.S.) 430) and on that finding the plaintiff would have been entitled to succeed if contributory negligence on his part had been negatived; but, inasmuch as the jury had been unable to agree upon that point, there must be a new trial: *Higgins v. Searle*, 72 J. P. 449.

NEGLIGENT NAVIGATION OF SHIPS.

The liabilities under this heading are governed by the Merchant Shipping Act 17 and 18 Vict., c. 104; 18 and 19 Vict., c. 91; 25 and 26 Vict., c. 63; 30 and 31 Vict., c. 124; and 36 and 37 Vict., c. 85 (1854, 1855, 1862, 1873). The Dominion Government has also laid down a code of rules contained in R. S. C., c. 75, "An Act respecting Navigation in Canadian Waters."

The steamer "Chase" was lying at her wharf in the Harbour Steamer of Halifax, when a storm of unusual violence arose with exterior, breaking away. ordinary suddenness, there having been no other indication of its approach than a falling barometer. Some additional precautions were taken so to moor her that she might ride out the storm safely, but these did not prove adequate, and breaking away she came into collision with several wharves, among them the plaintiff's, causing serious damage thereto. It appeared in evidence that other and more efficient methods might have been used to secure the steamer, and that had they been employed the probabilities were strongly in favour of her remaining fast to her wharf: Held, that she was liable for the damages done: *The "Chase,"* Y. A. D. 113. Affirmed on appeal to the Privy Council, Y. A. D. 125 (N.S.).

Excusable manœuvres executed in "agony of collision" brought about by another vessel cannot be imputed as contributory negligence on the part of the vessel collided with. The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard (art. 21) does not override the general rules of navigation. *The Leverington* (11 P. D. 117), followed: *The Cuba v. McMillan*, 26 S. C. R. 651. Agony of collision.

In an action against the owners of a steamboat for damages done to the plaintiff's bridge, it appeared that the steamer was found drifting against the bridge one morning after a storm, and that the injury complained of was thus caused: Held, sufficient *prima facie* proof of negligence, and that it lay upon defendants to account for the accident: *Cataragui Bridge Co. v. Holcomb*, 21 U. C. R. 273. Drifting.

If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the regulations for preventing collisions at sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation, where such contravention could not by any possibility have contributed to Neglect of regulations.

the collision: *The "Birgitte" v. Forward, The "Birgitte" v. Moulton*, 9 Ex. C. R. 339.

Slackening speed. In a dangerous and crowded channel the captain of a vessel, especially going down stream, must slacken speed, and, if overtaking another vessel, is bound to pass at such a distance that no harm will result to the other vessel from suction or displacement waves. The lookout man must devote himself solely to that duty, and if engaged at other work so that his attention is divided, it is not a proper compliance with the rule as to a proper look-out: *Cadwell v. The "C. F. Bielman"*, 10 Ex. C. R. 155, 7 O. W. R. 393.

Disregard of rules of road. In a case of collision, one vessel cannot justify a departure from the rules of navigation by the fact that the other vessel was also disregarding the rules. On the contrary, a primary disregard of the rules by one vessel imposes on the other vessel the duty of special care, prompt action, and maritime skill as well as the duty of acting in strict conformity to the rules applicable to the latter in the circumstances. Collision regulations have been framed for the protection of lives and property in navigation and are so strictly enforced that even where a vessel commits a comparatively venial error it cannot be absolved from the consequences. The rules of the road must be strictly observed, and when they are violated by both vessels the Court will hold them equally liable: *Canadian Lake and Ocean Navigation Co. v. The "Dorothy"*, 10 Ex. C. R. 163, 7 O. W. R. 621.

King's ship. Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and in the absence of statutory provision therefor no action will lie against the King for the negligence of his officers or servants on board of the ship: *Paul v. The King*, 9 Ex. C. R. 245.

Measure of damages. Where a collision results in a total loss of a vessel which is under successive charter parties, the measure of damages properly includes the profit which the owners would have made if the chartered voyages had been accomplished, less a reasonable sum to cover contingencies: *The Kate* (68 L. J. P. 41; (1899), P. 165) affirmed. Principle of *The Argentino* (59 L. J. P. 17; 14 App. Cas. 519), applied: *The Racine*, 75 L. J. P. 83; (1906), P. 273; 95 L. T. 597; 22 T. L. R. 575; 10 Asp. M. C. 300.

Tug and tow. The rule that where a vessel is being towed "the tug is servant of the tow," does not apply to the case of a steam-barge towing two other barges, the whole under the control of those on board the steam-barge. A steam-barge towing two barges, not exhibiting her regulation lights before sunrise, having no proper look-out, too great a length of tow-line, no additional tug to assist and proceeding on an improper course in view of obstacles ahead, is liable in damages for a collision that takes place in consequence: *Montreal Harbour Commissioners v. The "Bay State"*, Q. R. 31 S. C. 10.

When a vessel in motion collides with a vessel at rest the presumption is that the former is in fault, and this presumption will not be overcome by proof that the colliding vessel was compulsorily in charge of a pilot, unless it is also proved that the collision was due to the fault of the pilot: *Mann, Macneal & Co. v. Ellerman Lines*, 7 F. 213.

A schooner "hove-to" with her wheel made fast by a beckett which could be removed instantly, her look-out and wheelsman properly stationed, and maintaining a steady course, is not, with reference to such circumstances, open to the charge of being negligently navigated. 2. A vessel without a sufficient look-out has the burden cast upon her of proving that such fact did not contribute to the collision. 3. Apart from the regulations, in a case of impending collision, it is negligence for a steamship to fail to slacken speed, or to stop, or reverse, if such manoeuvre is necessary to avoid collision. 4. Where the defendant's preliminary act alleged that at a certain point the bearing of the ship at fault was "a little abaft the starboard beam," of the injured ship, evidence was admitted to shew that the line of approach was not more than two points abaft, or was forward of the beam of the injured vessel. 5. The wrong-doer cannot recover salvage remuneration for services rendered to the ship with which he has been in collision: *Magdalen Islands S.S. Co. v. The "Diana,"* 11 Ex. C. R. 40.

A common carrier is liable for the negligence of his servants in taking goods on board his vessel in his absence, though he may have directed them not to receive goods—the plaintiff having no notice of such instructions: *Street v. Morrison*, 5 All. 296 (N.B.).

Held, that a master may among other duties delegate to another the duty of selecting fellow workmen or servants, and that in such a case the master's obligation is limited to the exercise of a reasonable care in selecting a competent person for such purpose. In an action against defendants, the owners of a vessel, for employing incompetent sailors, whereby an accident happened to the plaintiff, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, a competent person for such purpose, and that he had hired the men in question: Held, that the defendants were not liable: *Wilson v. Hume*, 30 U. C. C. P. 542.

The owner of a chartered ship, in herself seaworthy, but rendered unseaworthy by the improper loading of cargo and ballast which is carried out under his orders, is liable for damage occasioned by his personal negligence: *City of Lincoln v. Smith*, 73 L. J. P. C. 45; (1904), A. C. 250; 91 L. T. 206; 9 Asp. M. C. 586.

Towage
contract.

Where a towage contract is made, it implies an undertaking that each party will duly perform his share of it; that proper skill and diligence will be used on board both tug and tow; and that neither party by neglect or mismanagement will create unnecessary risks to the other or increase any risk which might be incidental to the service undertaken. 2. If, in the course of the performance of the contract any inevitable accident happens to the one, without any default on the part of the other, no cause of action will arise: *The Julia*, 14 M. P. C. 210 at p. 230, followed; *Read v. The "Lillie,"* 11 Ex. C. R. 274.

Ship
foundering
at sea.

1. When a ship founders at sea without any one knowing the cause, there is a presumption that the disaster is the result of an unseaworthy state. Where the owner sets up accident or *vis major*, he is bound to prove it. 2. The owner of a ship warrants its navigability to the crew and is not released from the responsibility which proceeds from this warranty by an inspection of the ship made according to the terms of s. 587 et seq. of R. S. C. 1906, c. 113. Statutes affecting civil responsibility being beyond the competence of the Federal Parliament, the reservation in s. 342 of the same chapter touching the sending of ships to sea "reasonable and justifiable" applies only to the criminal consequences of the sending ships to sea in an unseaworthy state: *Grenier v. Connolly*, Q. R. 34 S. C. 405.

Towing.

A vessel which contracts to do her best to tow another to a named port, and, after honestly attempting so to do, fails through no fault of her own, is entitled to remuneration: *The Benlarig* (58 L. J. P. 24; 14 P. D. 3), followed. *The August Korff*, 72 L. J. P. 53; (1902), P. 166; 89 L. T. 194; 9 Asp. M. C. 428.

Sunk on
wreck.

The owner of a vessel, sunk in the fair-way of a navigable river, so as to be a danger to other vessels, who retains the possession, management and control of the wreck, is under an obligation to take reasonable care to warn other vessels of its position, and is liable for damage to another vessel occasioned by the neglect to give proper warning, though such neglect was that of an independent contractor employed by him: *The Snark*, 69 L. J. P. 41; (1900), P. 105; 82 L. T. 42; 48 W. R. 279; 9 Asp. M. C. 50.

Wrong
course.

Where a ship is pursuing a wrong course and has notice from another vessel that the latter is continuing on her course, the former must be held solely to blame for a resultant collision, and it is no defence to say that the other vessel by observing lights and heeding blasts might have deviated from the right course which she was pursuing and thereby avoided the collision: *The Chittagong*, 70 L. J. P. C. 121; (1901), A. C. 597; 85 L. T. 430; 90 Asp. M. C. 252.

Converging
courses

Vessels converging on a spot on courses and at speeds which present danger of collision are crossing vessels, and in the event of

collision the vessel which has the other on the starboard side, and has failed to keep out of the way of the other, is to blame under article 19 of the Canadian Regulations for Preventing Collisions at Sea: *The Albano v. Allan Line Steamship Co.*, 76 L. J. P. C. 33; (1907), A. C. 193; 96 L. T. 335; 10 Asp. M. C. 365; 23 T. K. R. 344.

When a licensed pilot is employed on board a vessel in a place while pilotage is compulsory, it is his duty to insist on having the effective control of the vessel, or to decline to act as pilot; and if he is ordered by the master to place himself in a position disadvantageous for the effective control of the vessel, and he acquiesces in the arrangement and continues to act as pilot, he will not escape responsibility for damages to another vessel: *Greenock Towing Co. v. Hardie*, 4 F. 215. Licensed pilot.

The owner of a chattel who is wrongfully deprived of its use may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expense consequent thereon. Where, therefore, a vessel is disabled by a collision with another, which is to blame, the owners of the latter are liable in substantial damages in respect of the withdrawal from service of the disabled ship, notwithstanding that the owners of the latter have a vessel in constant readiness to supply the place of any which may happen to be injured: *The City of Pekin* (59 L. J. P. C. 88; 15 App. Cas. 438), distinguished: *The Mediano*, 69 L. J. P. 35; (1900), A. C. 113; 89 L. T. 95; 48 W. R. 398; 9 Asp. M. C. 41. Deprivation of use of vessel.

NEGLIGENT KEEPING OF ANIMALS.

The owner of an animal which is ordinarily vicious, as a lion or a bear, is liable generally for its acts of ferocity, for he is bound to keep it secure at his peril; but the owner of a domestic animal, as an ox or a dog, is only liable if he knows that the animal is accustomed to do mischief. Under R. S. O. 1897, c. 271, s. 9, any person may kill any dog which he sees pursuing, worrying, or wounding any sheep or lamb. See also chapter 77, Ont. Statutes, 1910.

By section 15 the owner of any sheep or lamb killed or injured by any dog is entitled to recover the damage occasioned thereby from the owner or keeper of such dog by action or by summary proceeding, and the knowledge of the owner or keeper of the dog as to its viciousness need not be proved. The gist of the action is not the negligent keeping, but the keeping with the knowledge of the mischievous propensity, i.e., the *scienter*. See *Chase v. McDonald*, 25 C. C. C. P. 129; *Mason v. Morgan*, 24 U. C. R. 328. The right of action given by R. S. O. 271, s. 15, to the owner of sheep killed by dogs, must be prosecuted with the usual procedure in the appropriate forum. If properly tried in the County Court it may be tried

before a jury, and they then apportion the damages: *Fox v. William-son*, 20 A. R. 610.

The owner of sheep killed or injured by a dog can under R. S. O. 1897, c. 271, s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the act applies to a case where the dog has been set upon the sheep: *Regina v. Perrin*, 16 O. R. 446.

The defendant placed a large number of hives of bees upon his own land within 100 feet of the plaintiff's land. While the plaintiff was at work with two horses upon his own land, the bees attacked and stung the horses so that they died, and also stung and injured the plaintiff. In this action to recover damages for his loss and injury, the jury found *inter alia* that the bees were in ordinary flight at the time of the occurrence, that they were the defendant's bees, and that the defendant had reasonable grounds for believing that his bees were, by reason of the situation of his hives or their numbers, dangerous to persons or horses upon the highway or elsewhere than on the defendant's premises: Held, that the doctrine of *scienter*, or notice of mischievous propensities of the bees, had no application, nor could the absence of negligence, other than as found by the jury, relieve the defendant; it was his right to have on his premises a reasonable number of bees, or bees so placed as not unfairly to interfere with the rights of his neighbour, but if the number was unreasonable, or if they were so placed as to interfere with his neighbour in the fair enjoyment of his rights, then what would otherwise have been lawful became an unlawful act; the finding of the jury meant that the bees because of their number and situation were dangerous to the plaintiff, and the defendant was liable for the injury flowing directly from his unlawful act: *Lucas v. Pettit*, 12 O. L. R. 1906.

Animals Running at Large.—Held, that the colt in question in this case, five weeks old, following its dam, could not be said to be running at large; the universal custom of the country, which ought to govern, being for colts thus to follow the dam: *Hillyard v. Grand Trunk R. W. Co.*, 8 O. R. 583.

Held, that evidence of the common use of barbed wire fences in other townships, and that other municipalities held out inducements to erect them, should not have been rejected, as shewing that they were not considered dangerous or a nuisance: *ib.*

The owner of an animal, being liable for injuries caused by the animal, is presumed to be at fault, but he may escape liability by shewing that the injury was due to the fault of the victim: *Martin v. Hogg*, Q. R. 31 S. C. 529.

The owner of a turkey cock, which, without negligence, strays upon the highway contrary to a by-law of the municipality, is not liable for damages resulting from a horse taking fright and running

away at the sight of the bird acting as turkey cocks usually do: *Zumstein v. Shrumm*, 22 A. R. 263.

Owners of animals in this province allowing them to run at large, must take the risk of accidents from ill-constructed or insufficiently constructed fences. Thus the owner of unenclosed or insufficiently enclosed lands would be liable for damages resulting to estrays by reason of a dangerous trap (e.g., an unenclosed well on his property): *McLean v. Rudd*, 1 Alta. L. R. 505; 9 W. L. R. 283.

The person who keeps a savage dog with knowledge of its nature is responsible for any injury it does to another person notwithstanding that it was caused by the intervening voluntary act of a third person. The owner is bound to keep such an animal secure at his peril. The *prima facie* liability of the owner in such a case does not extend to injury brought about by the intervening voluntary act of a third person, at all events if the act be one of a criminal nature: *Baker v. Snell*, 77 L. J. K. B. 1090; (1908), 2 K. B. 825; 24 T. L. R. 811—C. A.

The owner in default in respect of the maintenance of his part of the line fence between two adjoining farms is responsible for the loss of animals of his neighbour, which, passing through a breach in the fence, reach a railway where they are killed by a train: *Paradis v. Parks*, Q. R. 32 S. C. 263.

In order to render the owner of a dog liable for a bite by the dog it is not necessary to shew that the dog has, to the knowledge of its owner, actually bitten or attempted to bite anybody. It is sufficient to prove that the dog is to the knowledge of its master ferocious in regard to human beings. Such ferocity may be of an intermittent character, as, for instance, when a bitch has pups: *Barnes v. Lucille*, 96 L. T. 680; 23 T. L. R. 389.

Animals *Feræ Naturæ*: *Brady v. Warren* (1900), 2 Ir. R. 632.

Negligent keeping of animals—Bees: *O'Gorman v. O'Gorman* (1903), 2 Ir. R. 573.

NEGLIGENT USE OF LAND.

See "Nuisance" and "Disturbance of Support of Land."

Where the unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill dam) is to injure his neighbour, an action lies for such injury, but not if such act *per se* would not be necessarily or probably injurious, but becomes so from a cause not under the control of either party. Negligence must then be proved to render a defendant liable: *Peters v. Devinney*, 6 U. C. C. P. 389.

If the owners of property allow it to be open to all comers, infants as well as children of maturer age, and place upon it a

machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable in consequence of their tender age to take care of themselves: *Cooke v. Midland Great Western Railway*, 78 L. J. P. C. 76; (1909), A. C. 229; 100 L. T. 626; 53 S. J. 319; 25 T. L. R. 375.

A person who intends that others shall come upon property of which he is the occupier or controller, for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and the appliances upon it, which it is intended shall be used in the work, are fit for the purpose to which they are to be put; nor does he discharge this duty by merely contracting with competent people to do the work for him: *Marney v. Scott*, 68 L. J. Q. B. 736; (1899), 1 Q. B. 986; 47 W. R. 666.

If the public enter upon private ground without invitation they take the risk of injury; but if there is a hole or a pit near a public road there may be a duty of the owner or occupier to fence it: *Devlin v. Jeffray's Trustees*, 5 F. 130.

Where a person uses his land for any purpose for which it may in the ordinary course of the enjoyment of land be used, and without any default or negligence on his part damage happens to his neighbour's premises, no liability attaches to him. Further, if a person claiming to be compensated for damage caused by dangerous matter upon his neighbour's land has consented to such dangerous matter being brought upon his neighbour's land, he cannot recover: *Blake v. Wolfe*, 67 L. J. Q. B. 233; (1905), 1 K. B. 472; 92 L. T. 414; 53 W. R. 262; 21 T. L. R. 266.

The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against: *Roberts v. Mitcnell*, 21 A. R. 433. An obligation may arise by implication from "invitation" by A. to use premises: *Heaven v. Pender*, 11 Q. B. D. 503—C. A. A person entering upon premises for his own purposes and without the knowledge of the occupant does so at his peril: *Rogers v. Toronto Public School Board*, 23 A. R. 597. When a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour: *Fletcher v. Rylands*, L. R. 1 Exch. 265; 3 H. L. 330. This principle discussed: *Roe v. Lucknow*, 21 A. R. 1; *Brown v. Eastern and Midland R. W. Co.*, 22 Q. B. D. 391, referred to.

The proprietor who first builds a house wall, intended to become common, has a right to establish the base of the wall on the first

soil sufficiently strong to support the wall which he intends to construct, and is not obliged to go deeper, although his neighbour may require a greater depth and may offer to bear the cost of the increased excavation and masonry. If the neighbour desires to have a heavier building, necessitating a deeper foundation, he must make the under structure at his own expense: *Roy v. Strubbe*, Q. R. 24 S. C. 520.

NEGLIGENT KEEPING OF FIRE OR INFLAMMABLE MATTER.

A railway company is not responsible for accidental fires if they have taken every precaution that science can suggest to prevent injury; they are only liable if guilty of some negligence in fact, and negligence cannot be implied from the mere employment of locomotives where the use of them has been expressly permitted by the legislature: *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679. See *McGibbon v. Northern*, 14 A. R. 91; *McLaren v. Canada Central*, S. A. R. 564.

The defendant is not entitled to deduct from the damage sustained money received by the same plaintiff under a fire policy.

By R. S. O. 1897, c. 267, "An Act to Preserve the Forests from Destruction by Fire," fire districts may be proclaimed. After such proclamation precautions must be observed, which are fully set out in the Act. Actions for contravention of the Act must be brought within three months after the contravention. See 1906, c. 49; 1908, c. 61.

Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time and season, and managed with due care, he is not responsible for damages occasioned by it. The defendant on afterwards discovering the fire, though he could easily have put it out after confining it to one spot, left it anticipating no danger, and after burning for four or five days the fire spread to the plaintiff's premises and destroyed his barn with a quantity of grain and hay. The Court considered that the principle and doctrine established in *Fletcher v. Rylands*, L. R. 3 H. L. 230, and *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, applied and that the defendant was liable for the damages sustained by the plaintiff even in the absence of actual negligence. *Gaston v. Wald*, 19 U. C. R. 586, doubted: *Furlong v. Carroll*, 7 A. R. 145. A man must exercise care and discretion as to the time and mode of clearing his land; and if his neighbour be injured by rashness or inconsiderateness on his part in setting out fire for that purpose he will be liable to him; but this is always a question for the jury, and the Court refused to disturb a verdict for defendant though the evidence would fully have warranted a different finding: *Wilkins v. Row*, 15 U. C. C. P. 325. However clear the rule may be that a party may kindle or permit fire to burn on his own land, still if it is likely by spread-

ing to injure his neighbour he is bound to put it out or exert himself so to do, otherwise he will be liable: *Ball v. Grand Trunk R. W. Co.*, 16 U. C. C. P. 252. Held, following *Dean v. McCarthy*, 2 U. C. R. 448, that a proprietor setting out fire on his own land in order to clear it is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence: *Gillson v. North Grey R. W. Co.*, 35 U. C. R. 475. Persons have a right to set out fire on their land for the purpose of clearing it, and if the flames spread under the influence of a wind suddenly arising, and cause damage to a neighbour, no action will lie without proof of negligence. It was held a misdirection in such a case to tell the jury that defendants were bound to have anticipated the rising of the wind and to use extraordinary caution: *Buchanan v. Young*, 23 U. C. C. P. 101.

The plaintiff and defendant were adjoining land owners, and a fire started in brush and fallen timber by the defendant for the purpose of clearing his land spread on to the plaintiff's lands: Held, applying the principle of *Rylands v. Fletcher*, L. R. 3 H. L. 330, that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it: *Crewe v. Mottershaw*, 9 Brit. Col. L. R. 246.

Chapter 268 of R. S. O. 1897 authorizes the appointment in townships of "Fire Guardians." After such appointment no fires can be set out between 1st July and 1st October without leave in writing of the Fire Guardians. By chapter 269 persons liable to perform statute labour may be called upon to extinguish foreign fires and the work so done may be allowed as statute labour.

See chapter 8, Ont. Statutes, 1910, setting aside Forest Reserves.

NEGLIGENCE OF FELLOW-SERVANTS.

A master, although liable for the negligence of a servant acting in the course of his employment, is not at common law generally responsible for an injury sustained by that servant owing to the negligence of another servant engaged with him in a common employment.

To make a master liable to his servant or workman, there must be personal negligence or interference of the master, or a special contract: *Ormond v. Holland*, E. B. & E. 102. The master is, however, bound to exercise due care and caution in the choice of his servants, otherwise he may become liable in respect of his own negligence in this respect: *Tarrant v. Webb*, 18 C. B. 787; and he is bound to take all reasonable precautions to secure the safety of his workmen: *Brydon v. Stewart*, 2 Macq. 30.

A servant takes upon himself the risk of negligence on the part of his fellow-servants, whatever position they hold, so long as they are fellow-servants. There is no exception to the rule that the

master has a personal duty to perform, which, in dangerous employments and in the case of an infant, he cannot delegate to others: *Cribb v. Aynoch*, 76 L. J. K. B. 948; (1907), 2 K. B. 548; 97 L. T. 181; 23 T. L. R. 550.

In actions at common law, and not under Employers' Liability Act, the negligent directions or conduct of a fellow-servant, however much he may be higher in grade or responsibility than the one injured, cannot be reckoned as negligence of the common master: *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62, overruling doctrine put forward in *Murphy v. Smith*, 19 C. B. N. S. 361; *Fairweather v. Owen Sound*, 26 O. R. 606.

New trial ordered in an action by a workman against his employer for personal injuries sustained through carelessness of a fellow workman, because, although the jury found negligence imputable to the defendants, and had stated in what that negligence consisted, they were not asked to and did not find whether such negligence was the cause of the plaintiff's injuries; nor when asked whether the defendants through their foreman were guilty of negligence, and if so in what such negligence consisted, were they explicitly directed to confine their findings to such negligence, if any, as upon the evidence, they should be satisfied had caused the explosion which injured plaintiff: *Hillyer v. Wilkinson Plough Co.*, 9 O. L. R. 711.

Where the plaintiff was required to perform a piece of work in a dangerous place by a person in the employment of the defendants, whose orders he was required to obey, and while so engaged, was struck by a moving car and severely injured, the company having failed to provide proper plant and a reasonably safe place for the performance of the work he was directed to do: Held, that the plaintiff was entitled to recover compensation for the injuries sustained, and that as the plaintiff, although aware of the serious danger of working where he did, felt obliged to do so under peril of dismissal if he refused, he was not guilty of such contributory negligence as would preclude his recovery: *Oliver v. Dominion Iron and Steel Co.*, 37 N. S. Reps. 183.

Differences between s.-s. 1 of s. 6 and the corresponding provisions of the English Act pointed out. Under s.-s. 1 of s. 6 of the Ontario Act, the employer is answerable, so far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person whether in his service or not to whom he intrusts the duty mentioned in the sub-section in the performance of that duty, in the same way and to the same extent as he would have been answerable at the common law had he taken upon himself personally the performance of the duty; and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs anyone to provide it ready for the use of the workman, that

person is one intrusted with the duty of seeing that the appliance is proper. *Giles v. Thames Ironworks Shipbuilding Co.*, 1 Times L. R. 469, and *Ferguson v. Galt Public School Board*, 27 A. R. 480, followed: *Markle v. Donaldson*, 7 O. L. R. 376, 8 O. L. R. 682.

Although an employer is not liable as a general rule for the result of accidents which happen to employees from dangers essentially inherent in the work which is being performed, he nevertheless becomes liable when reasonable precautions have not been taken by him to reduce the danger to the lowest point or remove it altogether: *Sparano v. Canadian Pacific R. W. Co.*, Q. R. 23 S. C. 292.

Held, that the principle adopted in actions of negligence against professional men should be applied, namely, that negligence cannot be found where the opinion evidence is in conflict and reputable skilled men have approved of the method called in question. At common law a master is bound to provide proper appliances for the carrying on of his work, and to take reasonable care that appliances, which, if out of order will cause danger to his servant, are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge either personally or by employing a competent person in his stead, and the purpose of s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897, c. 160, as modified by s. 6, s.-s. 1, is to take from the master his common law immunity for the neglect of such a person: *Schwob v. Michigan Central R. W. Co.*, 9 O. L. R. 86.

To disentitle a workman to recover damages for a defect in a machine under the Workmen's Compensation for Injuries Act, he must not only have a knowledge of the danger he incurs but also a thorough comprehension or appreciation of the risk he runs: *Haight v. Wortman and Ward Manufacturing Co.*, 24 O. R. 618.

The risk may arise from a defect in a machine which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result and notwithstanding continued to work, he ought to be regarded as *volens*: *Smith v. Baker*, A. C. (1891), at p. 357, quoted in *Poll v. Hewitt*, 23 O. R. 619.

Knowledge of workman: *Haight v. Wortman & Ward*, 24 O. R. 618. Master's knowledge of defect—if workman knows of this knowledge he is not bound to give notice: *Truman v. Rudolph*, 22 A. R. 250. Employers' liability—failure to furnish a guard, *per se* evidence of negligence on the part of the defendants: *Thompson v. Wright*, 22 O. R. 127.

In an action under the Fatal Accidents Act and the Workmen's Compensation Act for the death of the defendant's servant by their negligence, as alleged, the plaintiff has no right to claim for funeral expenses: *Makarsky v. Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Any person who uses dangerous objects in any industry or manufactory must take the greatest possible care to prevent accidents by adopting all the means and inventions known, and where it is proved that such precautions have not been taken, the owner of the industry is responsible for injuries to workmen arising from the dangerous machinery: *City of Montreal v. Gosney*, Q. R. 13 K. B. 214.

In an action for damages for physical injuries, the age of the victim and his personal condition as to means are relevant, but not the number of his children or the fact that he has to support them: *Riendeau v. Peck Rolling Co.*, 6 Q. P. R. 143.

The injuries were caused by the plaintiff's failure to withdraw himself from danger in response to a signal. The jury found that the defendant was negligent, and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy, might not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was: "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for the plaintiff: *Held*, that the judgment must be affirmed: *Marshall v. Cates*, 10 B. C. R. 153.

An employer is liable for the consequences, not of danger but of negligence. He performs his duty when he furnishes machinery of ordinary and reasonable safety. Reasonable safety means according to the usages, habits, and ordinary risks of the business. No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It is only so far as a duty arises on the part of the employer to provide proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is a cause of injury, that a right of action accrues to the person injured: *Patton v. Alberta Railway and Coal Co.*, 2 Terr. L. R. 438.

Employers are no less responsible for the injuries occasioned by the defective system of using their machinery than they would have been for a defect in the machinery itself. There being no Employers' Liability Act in force in British Columbia when the injury in question happened, plaintiff was not precluded from obtaining compensation by failure to give notice of the defects to his employers: *Webster v. Foley*, 21 S. C. R. 580; *Stephens v. Chausse*, 15 S. C. R. 379.

Where an injury has occurred by reason of defendant's neglect to provide the best known or conceivable appliance to prevent accidents, the employer is subject to common law liability, and the assessment of damages should be left to the reasonable discretion of the jury: *Balch & Peppard v. Romburg*, Supreme Court, 12th June, 1900.

A master who makes an intermittent use of electrical appliances, dangerous when charged with electricity, and necessarily placed within

reach of his workmen, is under obligation to cause them to be warned on every occasion upon which the current of electricity is turned on, and in default is responsible for injuries which may occur from contact with the appliances. The burden of proof that a sufficient notice to employees has been given is upon the master: *Shawinigan Carbide Co. v. Saint-Onge*, Q. R. 15 K. B. 5.

As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony or presumptions, weighty, precise and consistent, that the employer is chargeable with negligence, which was the immediate necessity and direct cause of the accident which led to the injuries suffered; it is the duty of an appellate Court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the finding of a jury in favour of the plaintiff, not assented to by the trial Judge, have been assented to by two Courts below. *The Asbestos and Asbestic Co. v. Durand* (30 S. C. R. 285), discussed and approved: *Dominion Cartridge Co. v. McArthur*, 31 S. C. R. 392.

A master is not liable for the wrongful act of a servant though intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority and is one which the master himself could not legally do: *Coll v. Toronto R. W. Co.*, 25 A. R. 55.

The driver of the defendants' ice-wagon, after delivering their ice along his prescribed route, instead of returning to the company's barns, got drunk, and some hours after he was due to return, and while driving out of his homeward course, ran over the plaintiff, causing injury: Held, that the defendants were not liable, as the driver was not acting in the course of his employment at the time of the accident: *Wills v. Belle Ewart Ice Co.*, 12 O. L. R. 526, 8 O. W. R. 331.

Where a servant or agent commits a wrong within the scope of his employment, and in the interests or supposed interests of the master or principal, and not for his own private and fraudulent purposes, the master or principal is liable. On the other hand, if the wrong is committed by a servant or agent, not for his master's or principal's purposes or interests, but to carry out the servant's own private ends, the master or principal is not liable: *Malcolm, Bruncker & Co. v. Waterhouse*, 24 T. L. R. 854.

Where the workman is aware that the employer knows of the defect that ultimately causes the injury he is not bound under s.-s. 3 of s. 6 of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. c. 30 (O.), to give information thereof to the employer, and his failure to give information in other cases will not bar his

right of action if a reasonable excuse is shown for the omission, this being a question of fact for the jury. Where both the employer and the workman know of the defect, and it is the workman's own duty to see that the defect is remedied, but orders were given to him with that object are not carried out, he cannot recover: *Truman v. Rudolph*, 22 A. R. 250. A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself. At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery, or a defective system, by reason of his failure to give notice to the employer of such defect: *Webster v. Foley*, 21 S. C. R. 580. The effect of s. 7 of Factory Act, and what is meant by voluntary incurring risk of injury, considered: *McClure v. Gale Manufacturing Co.*, 19 A. R. 117, commented on.

The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories Act; and for this reason the employer has to exercise more than ordinary precautions for the well-being and safe-guarding of minors who have been put into factory work contrary to the prohibition of the legislature: *O'Brien v. Sanford*, 22 O. R. 136.

By the Ontario Factories Act, R. S. O. 1897, c. 256, s. 3, the plaintiff's employment was wholly unlawful and a prima facie case under that Act was made simply by proof of his age, the employment and the injury. To such prima facie case, no answer was made; there was no finding of contributory negligence and the employer's premises were, within the meaning of the Act, a factory, of which the elevator formed part. The employers were, therefore, liable under the Factories Act to the extent of \$1,500: *Jones v. Morton Co., Limited*, 14 O. L. R. 402.

Permitting a young child to drive a mowing machine is evidence of negligence: *Carroll v. Freeman*, 23 O. R. 283.

A miner was getting into the bucket by which he was to be lowered into the mine when owing to the chain not being checked his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners, the jury found that the system of lowering the men was faulty; the man in charge of it negligent; and that the engine and brake by which the bucket was lowered were not fit and proper for the purpose. Printed rules were posted near the mouth of the pit, providing among other things that signals should be given by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells, and that the injured miner knew of the rules, but had not complied with them on the

occasion of the accident. Held, that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence but non-use of the signals, the rules having, with consent of the employees and of the persons in charge of the men, been disregarded, which indicated their abrogation: the new trial should, therefore, not have been granted. Held, further, that as the negligence causing the accident was not that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of the damages, but the latter must be assessed under the Employers' Liability Act (1897), R. S. B. C. c. 69): *Warmington v. Palmer*, 32 S. C. R. 126. Owners of mines are not liable for an injury to a workman in their employ caused by the negligence of their foreman or superintendent, if they have selected proper and competent persons personally to superintend and direct the work, and have furnished them with adequate materials and resources for the work. The party asserting the negligence must prove it, and the negligence of a servant in such a case is not the negligence of the master: *Campbell v. General Mining Association*, 1 N. S. D. 415 (N.S.). Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow servant, though it may be of a higher grade: *Rudd v. Bell*, 13 O. R. 47.

Where employment is attended with danger to life, e.g., from poisonous exhalations in a manufactory of chemicals, an employer is bound to give special warning to his employees of the dangers of the different tasks given them, and to have some system of supervision over them while at work. A general warning to the men that their work is dangerous and demands the exercise of care, is not sufficient, and will not relieve the employer from liability for accidents: *Nichols Chemical Co. of Canada v. Forster*, Q. R. 15 K. B. 411.

The fact that for many years an operation has been carried on in the same way and with the same appliances without an accident, while strong evidence in the master's favour, is not conclusive, and if there is evidence that the system is defective the case must be submitted to the jury: *Commarford v. Empire Limestone Co.*, 11 O. L. R. 119, 6 O. W. R. 1018.

The above rules must now be read subject to the Factories Act, R. S. O. 1897, c. 256. The Workman's Compensation for Injuries Act, R. S. O. 1897, c. 160, provides for compensation against an employer where personal injury is caused to a workman by reason of

1. Defect in machinery.
2. Negligence of superintendent.

3. Negligence of any co-employee under whose orders the injured workman was.

4. Disobedience to by-laws of some other employee.

5. Negligence of pointman, driver or train hand on a railway.

Notice in writing must be given within twelve weeks after the injury, and the action must be commenced within six months, and in case of death within twelve months from the time of death. Workmen under certain circumstances (section 10) may contract themselves out of the Act.

Assessors may be appointed for the purpose of ascertaining the amount of the compensation, which is limited (section 7).

The clauses above quoted, relating to railway employees, apply also to other employees.

See also Ont. Stats. 1899, c. 18. The provisions of section 14 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (O.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it: *Cavanagh v. Park*, 23 A. R. 715.

NEGLIGENCE OF RAILWAY COMPANIES.

By Dominion Railway Act, every railway company which runs trains upon the railway for the conveyance of passengers shall use the best appliances for communication between conductors and engine drivers, and for brakes, and for disconnecting cars, and for securing seats in the cars. By the same Act, the company must erect and maintain fences and cattle guards. While maintained, the company shall not be liable for damages done to cattle, etc., unless the same are caused wilfully or negligently by the company or by its employees.

The Railway Act, R. S. C. c. 37, contains the following provisions relating to the powers of the Board of Railway Commissioners for Canada:

63. The Board may order that any witness resident or present in Canada may be examined upon oath before or make production of books, papers, documents or articles to, any one member of the Board or before or to any officer of the Board or before or to any other person named for the purpose by the order of the Board, and may make such orders as seem to it proper for securing the attendance of such witness, and his examination and the production by him of books, papers, documents or articles, and the use of the evidence so obtained, and otherwise exercise for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any

Powers re-
garding
witnesses
and
evidence.

superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof; provided that no person shall be compellable against his will to attend for such examination or production at any place outside the province in which he is served with the order of the Board for the purpose.

Commissions to take evidence in foreign countries.
Tariff.

2. The Board may issue commissions to take evidence in a foreign country, and make all proper orders for the purpose and for the return and use of the evidence so obtained.

Presumed legal as against company

78. If the company files with the Board any tariff, and such tariff comes into force, and is not disallowed by the Board under this Act, or if the company participates in any such tariff, the tolls under such tariff while so in force shall, in any prosecution under this Act as against such company, its officers, agents or employees, be conclusively deemed to be the legal tolls chargeable by such company.

The Board may, upon the application of any land owner, order the company to provide and construct a suitable farm crossing across the railway, wherever in any case the Board deems it necessary for the proper enjoyment of his land on either side of the railway, and safe in the public interest.

2. The Board may order and direct how, when, where, by whom and upon what terms and conditions such farm crossing shall be constructed and maintained.

Company shall make crossings.

252. Every company shall make crossings for persons across whose land the railway is carried, convenient and proper for the crossing of the railway for farm purposes.

Live stock

2. Live stock, in using such crossings, shall be in charge of some competent person who shall take all reasonable care and precaution to avoid accidents.

Gates to be closed.

255. The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when not in use.

Expulsion.

281. Every passenger who refuses to pay his fare may by the conductor of the train and the train servants of the company be expelled from and put out of the train with his baggage, at any usual stopping place, or near any dwelling house, as the conductor elects; provided that the conductor shall first stop the train and use no unnecessary force.

No claim for injuries in certain cases

282. No person injured while on the platform of a car or on any baggage or freight car in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury.

if room inside of the passenger cars sufficient for the proper accommodation of the passengers was furnished at the time.

283. A check shall be affixed by the company to every parcel of Company baggage having a handle, loop or suitable means for attaching a ^{to affix checks.} check thereupon delivered by a passenger to the company for transport; and a duplicate of such check shall be given to the passenger delivering the same.

2. In the case of excess baggage the company shall be entitled ^{Excess baggage} to collect from the passenger before affixing any such check the toll authorized under this Act.

294. No horses, sheep, swine, or other cattle shall be permitted ^{Cattle not} to be at large upon any highway, within half a mile of the inter- ^{allowed at} section of such railway, with any railway at rail level, unless they ^{large near} are in charge of some competent person or persons to prevent their ^{railway.} loitering or stopping on such highway, at such intersection, or straying upon the railway.

2. All horses, sheep, swine or other cattle found at large con- ^{May} trary to the provisions of this section may by any person who finds ^{be im-} them at large be impounded in the pound nearest to the place where ^{pounded.} they are so found, and the poundkeeper with whom the same are impounded shall detain them in like manner and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

3. If the horses, sheep, swine or other cattle, of any person ^{No right} which are at large contrary to the provisions of this section are ^{of action.} killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. When any horse, sheep, swine or other cattle at large, whether ^{Cattle} upon the highway or not, get upon the property of the company ^{killed or} and are killed or injured by a train, the owner of any such animals ^{injured on} so killed or injured shall, except in the cases otherwise provided for ^{property} by the next following section, be entitled to recover the amount of ^{of com-} such loss or injury against the company, in any action in any court ^{pany.} of competent jurisdiction, unless the company establishes that such animals got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

5. The fact that any such animal was not in charge of some ^{Right to} competent person or persons shall not, if the animal was killed or ^{recover} injured upon the property of the company, and not at the point of ^{preserved.}

intersection with the highway, deprive the owner of his right to recover.

No right of action if **295.** No person whose horses, cattle, or other animals are killed or injured by any train shall have any right of action against any company in respect of such horses, cattle or other animals being so killed or injured, if the same were so killed or injured by reason of any person—

Gates not closed. (a) For whose use any farm crossing is furnished failing to keep the gates of each side of the railway closed when not in use, or

Or wilfully left open. (b) Wilfully leaving open any gate on either side of the railway provided for the use of any farm crossing, without some person being at or near such gate to prevent animals from passing through the gate on to the railway, or

Or fence taken down. (c) Other than an officer or employee of the company, while acting in the discharge of his duty, taking down any part of a railway fence, or

Or cattle turned within railway inclosure. (d) Turning any such horse, cattle, or other animal upon or within the inclosure of any railway except for the purpose of and while crossing the railway in charge of some competent person, using all reasonable care and precaution to avoid accidents, or

Or railway used without consent. (e) Except as authorized by this Act without the consent of the company, riding, leading, or driving any such horse, cattle, or other animal, or suffering the same to enter upon any railway, and within the fences and guards thereof.

Company to keep right of way clear. **297.** The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter.

Liability for fire caused by locomotive. **298.** Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage, and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction; provided, that if it be shewn that the company has used modern and efficient appliances, and has not otherwise been guilty of any negligence, the total amount of compensation recoverable in respect of any one or more claims for damage from a fire or fires started by the same locomotive, and upon the same occasion, shall not exceed five thousand dollars.

Proviso.

Apportionment of compensation. 2. The compensation in case the total amount recovered therefor is less than the claims established, shall be apportioned amongst the parties who suffered the loss, as the court or judge may determine.

3. The company shall have an insurable interest in all property ^{Company} upon or along its route, for which it may be held liable to compensate ^{has insur-} the owners for loss or damage by fire caused by a railway locomotive, ^{able in} ~~and may procure insurance thereon in its own behalf.~~ ^{terest}

306. All actions or suits for indemnity for any damages or injury ^{Limitation} sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards.

2. In any such action or suit the defendants may plead the ^{Pleadings.} general issue and may give this Act and the special Act, and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act, or of the special Act.

3. Nothing in this section shall apply to any action brought ^{Certain} against the company upon any breach of contract, express or im- ^{actions} plied, or for relating to the carriage of any traffic, or to any action ^{excepted.} against the company for damages under the following provisions of this Act respecting tolls.

4. No inspection had under this Act, and nothing in this Act ^{Company} contained, and nothing done or ordered, or omitted to be done or ^{not} ordered under or by virtue of the provisions of this Act, shall relieve ^{relieved.} or be construed to relieve any company of or from or in any wise diminish or affect any liability or responsibility resting upon it, under the laws in force in the province in which such liability or responsibility arises either towards his Majesty or towards any person, or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative, of any person, for anything done or omitted to be done by such company or for any wrongful act, neglect or default, misfeasance, malfeasance or non-feasance of such company.

Further,

(1) All trains shall be started and run at regular hours fixed ^{Trains to} by public notice, and shall furnish sufficient accommodation for the ^{start at} transportation of all such passengers and goods as are within a ^{regular} reasonable time previously thereto offered for transportation at the ^{hours.} place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way passen ^{Passengers} gers and goods from the trains. ^{and goods}

(2) Such passengers and goods shall be taken, transported to ^{to be car-} and from, and discharged at such places on the due payment of the ^{ried on} toll, freight or fare lawfully payable therefor. ^{payment} ^{of fare or} ^{freight.}

The company liable for neglect or refusal. (3) Every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants.

The clauses next above set out are found in the Railway Act of Ontario, Ont. Statutes, 1906, chap. 30.

Similar clauses to the other sections referred to are also found in the same Act.

By R. S. O., 1897, c. 266, "The Railway Accidents Act," special provisions are made for the safety of railway employees and the public. See Statutes, 1899, c. 18; 1900, c. 44.

By R. S. O., 1897, c. 241, provisions are made for the crossing of railways by streets, drains, and water mains.

By R. S. O., 1897, c. 160, s. 5, where within this Province personal injury is caused to a workman employed on or about any railway, by reason of certain defects specified in such section, the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right to compensation and remedies against the company as if the workman had not been a workman or nor in the service of the company, nor engaged in its work.

By sub-section 1 of section 6 the remedy is taken away, and there is no right of compensation unless the defect arose from, or had not been discovered or remedied owing to the negligence of the company, or of some person in the service of the company, and entrusted by them with the duty of seeing that the ways, works, machinery, plant, building or premises, were in proper condition.

By section 6, sub-section 3, in any case where the workman knew of the defect or negligence which caused his injury, and failed within reasonable time to give notice to the company or some person superior to himself in the company's service, unless he was aware that the company or such superior already knew of the said defect or negligence, in such case the workman loses his remedy.

Provided that the workman is not, by reason only of his continuing in the employment of the company with knowledge of the defect, negligence, act, or omission which caused his injury, to be deemed to have voluntarily incurred the risk of the injury.

In the case of an accident on the railway it is not enough for the plaintiff to shew that there has been an accident upon their line, and thence to argue that therefore the company are liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of

some precaution which the defendants might and ought to have resorted to; the plaintiff should also shew with reasonable certainty what particular precaution should have been taken: *Daniel v. Metropolitan Ry. Co.*, L. R. 3 C. P. 216, 222.

The defendant may shew that the immediate and proximate cause of the injury was the unskillfulness or negligence of the plaintiff; but although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong: *Bridge v. Grand Junction Railway*, 3 M. & W. 244.

Railway companies are bound to use reasonable care and diligence in the conveyance of passengers; but they are not common carriers of passengers, and are not under obligation to carry safely: *East Indian Railway v. Kalidas Mukerjee*, 70 L. J. P. C. 63; (1901), A. C. 396; 84 L. T. 210.

A railway company is not liable in damages for failing to see an intoxicated passenger safely off the platform at which he arrives: *McCormick v. Caledonian Railway*, 6 F. 362.

Besides the obligations which arise from their contracts of carriage, to protect the person and preserve the property of their passengers, carriers of passengers are also responsible for losses caused by the faults of their servants. Where the employees of a railway company, in the course of a journey, detach a car from a train, giving notice only in the car itself and not in the other cars in which a passenger concerned may be for the moment, there is a fault on the part of the employees for which company are liable: *Great Northern R. W. Co. v. Bainer*, Q. R. 18 K. B. 72.

It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with them or not: *Taylor v. Manchester, etc., R. W. Co.* (1895), 1 Q. B. 134, at p. 140, citing *Marshall's Case*, *supra*; *Austin v. Great Western R. W. Co.*, L. R. 2 Q. B. 442; *Foulkes v. Metropolitan District R. W. Co.*, 5 C. P. D. 157; and *Berringer v. Great Western R. W. Co.*, 4 C. P. D. 163 is to the same effect.

A traveller on approaching a railway crossing is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing, and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to cross the track in front of it without looking, merely because the warning required by law has not been given: *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100. See *Morrow v. Canadian Pacific R. W. Co.*, 21 A. R. 149. It is the duty

of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is contributory negligence: *Johnson v. Northern R. W. Co.*, 34 U. C. R. 432. Held, that obedience to the ringing of the bell or sounding the whistle at or approaching crossings as directed by the statute does not of itself free the company from responsibility for accidents or damages arising from any neglect or breach of duty: *Ham v. Grand Trunk R. W. Co.*, 11 U. C. C. P. 86. The statutory obligation to ring the bell or sound the whistle applies only to a highway crossing, and not to an engine shunting on defendant's own premises: *Casey v. Canadian Pacific R. W. Co.*, 15 O. R. 574. Judgment in 19 O. R. 164, affirmed by the Court of Appeal upon the ground that the defendants had omitted to comply with the statutory requirements as to ringing the bell when approaching a railway crossing: *Burton, J.A.*, dissenting. *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 282, 9 S. C. R. 311, considered.

Ringling bell or sounding whistle, if impracticable, other precautions must be adopted. No rule, "stop, look, and listen," in force in Ontario: *Hollinger v. C. P. R.*, 21 O. R. 705.

Neglect of railway train to give warning at a crossing: *Anderson v. G. T. R.*, 16 C. L. T. 185.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that a railway company has no authority to build its road so that part of its road-bed shall be some distance below the level of the highway unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road, and any other company operating it, is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it. A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track, though there was no contract between the engine and the carriage: *Grand Trunk R. W. Co. v. Rosenberger*, 9 S. C. R. 311, followed; *Sibbald v. Grand Trunk R. W. Co.*, 18 A. R. 184, 20 S. C. R. 259. Section 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway," applies to shunting and other temporary movements in connection with the running of trains, as well as to the general traffic. Judgment in 25 A. R. 437 affirmed: *Canada Atlantic R. W. Co. v. Henderson*, 29 S. C. R. 632.

Upon the proper construction of s 237, s.s. 4 of the Dominion Railway Act, 1903, a finding that the horse was killed upon the property of the defendants was sufficient to entitle the plaintiff to recover unless it was shewn by the defendants that the animal got at large through the negligence of the owner or custodian, and such negligence was sufficiently negatived, in view of the Judge's charge, by the finding of the jury that the defendants were responsible: *Bacon v. Grand Trunk R. W. Co.*, 12 O. L. R. 196, 7 O. W. R. 753.

Horses running at large killed by train—no municipal by-law allowing horses so to run—defendants not liable: *Duncan v. C. P. R.*, 21 O. R. 355.

Cattle "at large." The question whether cattle are at large or not need not under all circumstances be submitted to the jury. It is for the Judge to say in that case, as in others, whether there is any evidence for the jury: *Thompson v. G. T. R.*, 22 A. R. 453.

A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default or misconduct of any kind on the part of the company or their servants." Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries by him in a collision caused by their servants' negligence: *Hall v. North-Eastern R. W. Co.*, L. B. 10 O. B. 437, applied: *Bicknell v. Grand Trunk R. W. Co.*, 26 A. R. 431.

Absence of cattle-guards—horses not in charge of any person: *Nixon v. G. T. R.*, 23 O. R. 124. In this case the Court construed section 2 of chapter 28 of Dominion Acts of 1890, which amended section 194 of the Railway Act of 1888 by substituting a new subsection.

Negligence of man in charge: *Garland v. Toronto*, 23 A. R. 238. Negligence of employee—specific instructions: *Weegar v. G. T. R.*, 23 S. C. R. 422.

A railway company which accepts goods for carriage by a named route is liable to the consignor in damages for loss occasioned to him owing to the goods being carried by a different route: *Mallett v. Great Eastern Railway*, 68 L. J. Q. B. 256; (1899), 1 Q. B. 309; 80 L. T. 53; 47 W. R. 334.

Private sidings: *Cowan v. North British Railway*, 3 F. 667.

A railway company is liable for damages to goods from negligence, even though the shippers of the goods agree in consideration

of the reduced freight not to hold the company liable: *Cobban v. C. P. R.*, 23 A. R. 115.

In an action for damages resulting from a railway accident, when negligence is charged, reports of officials of the company, as to the accident, made before the defendants had any notice of litigation, and in accordance with the rules of the company, are not privileged from production, although one of the purposes for which they were prepared was for the information of the company's solicitor in view of possible litigation: *Savage v. Canadian Pacific Ry. Co.*, 16 Man. L. R. 381.

For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment: *Wood v. Canadian Pacific R. W. Co.*, 30 S. C. R. 110.

A railway company are not bound to maintain any but the usual and direct road for access and egress to and from their station; and a passenger taking an indirect road not appropriated to the purpose of a footway cannot hold the company responsible for damages or accident thereby: *Walker v. Great Western R. W. Co.*, 8 U. C. C. P. 161. A railway company are bound to provide for passengers safe means of ingress to and egress from its stations; and where a passenger arriving at a station at night walked along a platform not intended but frequently used as a means of exit, but which was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company were held liable in damages: *Oldright v. Grand Trunk R. W. Co.*, 22 A. R. 286.

A watchman was employed by the defendant to lower bars or gates across the highway at each side of a crossing on the approach of trains, and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train was passing and the gates down, the plaintiff, a lad of sixteen, and two other lads, climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them, which struck the plaintiff in the eye, destroying the sight: Held, that this act having been done, not of mere malice or ill temper or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so enabling the watchman to perform the duty required by him, the defendants, his employers, were responsible in damages: *Hammond v. Grand Trunk Railway Co.*, 9 O. L. R. 64.

Semble, that a distinction exists between the approach of an overhead bridge on a public highway and the approach on private lands

to a farm crossing over the line of rail. While the presumption will be in the case of the former that the approach is part of the bridge, and to be kept in repair by the railway company, in the case of the latter in the absence of original compensation as to the crossing, and of express agreement, while it is for the company to maintain the crossing over its limits, it is for the owner to maintain the approach within his limits: *Palmer v. Michigan Central R. R. Co.*, 7 O. L. R. 87.

A railway company whose railway crosses the streets of a town not only must not allow its trains to go faster than the speed allowed by the Railway Act, but besides, in order to escape liability for accidents, must put guards and barriers at the places where the railway crosses the streets: *Girard v. Quebec and St. John R. W. Co.*, Q. R. 25 S. C. 245.

The omission of a common law duty is actionable negligence, equally with the omission of a statutory duty, and the common law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning: *Wallman v. Canadian Pacific R. W. Co.*, 16 Man. L. R. 83.

Where the breaking of a rail is shewn to be due to the severity of the climate, and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selecting, testing, laying, and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail: *Canadian Pacific Ry. Co. v. Chalifoux*, 22 S. C. R. 721. A railway company breaking rules made to insure public safety upon a railway and traffic bridge is guilty of negligence and liable for damages occasioned through the disobedience of orders or recklessness of its employees: *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2nd ed.) 729.

The duty of a railway company is to keep frog spaces continuously filled: *Miscner v. Michigan Central Railway Co.*, 24 O. R. 411.

In an action against a railway company for so negligently managing a fire which had begun upon defendants' track that it extended to the plaintiff's land adjoining: Held, that the limitation clause did not apply, the injury charged being at common law by one proprietor of land against another, independent of any user of the railway: *Prendergast v. Grand Trunk R. W. Co.*, 25 U. C. R. 193.

A railway company are responsible for damages caused for fire which is started by sparks from one of their engines in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous

accumulation: *Rainsville v. G. T. R. Co.*, 25 A. R. 242, 29 S. C. R. 201.

A railway company is not liable for the damage resulting from a fire caused by sparks from an engine running on their line, in the absence of negligence in the construction or use of such an engine: *Canadian Pacific Railway v. Roy*, 71 L. J. P. C. 51; (1902), A. C. 220; 86 L. T. 127; 50 W. R. 415.

In an action against a railway company for negligence causing fire by sparks from their engine, the cause of the fire may be proved by circumstantial evidence: *Rainsville v. Grand Trunk R. W. Co.*, 28 O. R. 625. Affirmed, 25 A. R. 242, 29 S. C. R. 201. Held, also, on the authority of *Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 679, that where there is no negligence either in the construction or the management of the locomotive, the company are not liable for injury resulting from the mere emission of fire therefrom into the adjoining lands: *Ball v. Grand Trunk R. W. Co.*, 16 U. C. C. P. 252.

As to damages occasioned by fire from locomotives, besides the general principles already mentioned, special provisions are made by R. S. O. 1897, c. 267, s. 9, "An Act to Preserve the Forests from Destruction by Fire," already referred to, enforcing special regulations as to locomotives.

Where a train is approaching a crossing, and the persons in charge neglect to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident or because his horses were unmanageable: *Tyson v. Grand Trunk R. W. Co.*, 20 U. C. R. 256.

A boy over eight years of age entered from the adjoining highway the unfenced freight yard of the defendants, for the purpose of gathering pieces of coal dropped from the cars, and in doing so got under or alongside the wheels of a car, which, in being shunted, ran over and killed him, at a place over 400 feet from where he entered the yard: Held, that he was wrongfully trespassing where he had no business or invitation to be: Held, also, that the plaintiffs had not satisfied the onus cast upon them to establish by evidence circumstances from which it might fairly be inferred that there was reasonable probability that the accident resulted from the absence of a fence at the place where the boy entered: *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157, and *Daniel v. Metropolitan R. W. Co.*, L. R. 3 C. P. 216, L. R. 5 H. L. 45, followed: *Newell v. Canadian Pacific R. W. Co.*, 12 O. L. R. 21, 7 O. W. R. 771.

The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory

signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries: Held, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence and must be left to the jury: *Morrow v. Canadian Pacific R. W. Co.*, 21 A. R. 149, and *Vallee v. Grand Trunk R. W. Co.*, 1 O. L. R. 224, followed: *Sims v. Grand Trunk R. W. Co.*, 10 O. L. R. 330.

Three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track, and were struck by a passenger train coming from the direction opposite to that of the freight train and killed. The passenger train was running at the rate of 45 miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the railway company, the jury found that the death of the three persons was due to negligence "in violating the statute by running at an excessive rate of speed," and that deceased was not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal: Held, that the defendants were liable, that the deceased had a right to cross the track, and there was no evidence of want of care on their part, and the same could not be presumed, and though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved, and their finding was justified: *McArthur v. Dominion Cartridge Co.* (1905), A. C. 72, followed. *Wakelin v. London and South-Western R. W. Co.*, 12 App. Cas. 41, distinguished. Held, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care, that owing to the snowstorm and the escaping steam and noise of the freight train, they might well have failed to see the headlight, or hear the approach of the passenger train if they had looked and listened. Judgment of the Court of Appeal affirmed: *Grand Trunk R. W. Co. v. Hainer*, 36 S. C. R. 180.

In the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted, the jury found that "the deceased voluntarily accepted the risk of shunting," and that the death of the deceased was caused by defendants' negligence in the shunting in giving the car too strong a push: Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim *volenti non fit injuria* had no application. *Smith v. Baker* (1891), A. C. 325, applied. Judgments in 25 O. R. 209, and 22 A. R. 292, affirmed: *Canada Atlantic R. W. Co. v. Hurdman*, 25 S. C. R. 205.

The fences required to be erected by the railway company, under s. 254 of the Railway Act, R. S. C. 1906, c. 37, are for all purposes

which they may serve; and consequently by virtue of s. 427, the company are liable for all damage of whatever kind resulting from the omission to fence. The Fence Ordinance (N. W. T. 1903, 2nd session, c. 28), has not application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which animals doing damage have entered. It makes no difference whether the rest of the lands are fenced or not: *Toll v. Canadian Pacific R. W. Co.*, 1 Alta. L. R. 244, considered. *Winterburn v. Edmonton, Yukon and Pacific R. W. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 298.

When it is proved that animals killed by a train of a railway company had been allowed to go at large on a public road through the negligence or wilful act or omission of the owner or his agent, and, in consequence thereof, got upon the right of way through a defect in the railway fence, s.s. 4 of s. 237 of the Railway Act, 1903 (s. 294 of c. 37 of R. S. C. 1906) protects the company from any claim for damages, although the company had failed to observe the requirement of s. 199 (now 254) by neglecting to keep the fence along the right of way in proper repair: *Murray v. Canadian Pacific R. W. Co.*, 7 W. L. R. 50; *Becker v. Canadian Pacific R. W. Co.*, 7 Can. Ry. Cas. 29, 5 W. L. R. 569, and *Bourassa v. Canadian Pacific R. W. Co.*, 7 Can. Ry. Cas. 41, Q. R. 30 S. C. 385, followed. 2. Section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured, and, therefore, s. 294 (now 427), being only of general application, cannot be interpreted so as to make the company liable in a case in which, by s. 237, they are expressly relieved from liability: *Clayton v. Canadian Northern R. W. Co.*, 7 W. L. R. 721, 17 Man. L. R. 426.

There is no express provision in the present Railway Act equivalent to s. 16 of the Consolidated Railway Act of 1897, as amended by 46 Vict. c. 24, s. 9 (D.), under which it was decided in *Davis v. Canadian Pacific R. W. Co.* (1886), 12 A. R. 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute.

Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the duty imposed upon the defendants by s. 254 of the Railway Act to "erect and maintain upon the railway" fences "suitable and sufficient to prevent animals from getting on the railway," for breach of which duty a statutory right of action against the company is given by s.s. 2 of s. 427 of the Act, to any person injured, for the full amount of damage sustained thereby.

Prima facie the fence was erected by the company in accordance with their statutory obligation to do so where lands through

which the railway passes are "inclosed and either settled or improved" (s. 254, s.-s. 4) : and the onus lay on the defendants to shew that at the time when the fence was erected it was not "required" by the Act: *New Brunswick R. W. Co. v. Armstrong* (1893), 23 N. B. R. 193, approved and followed. *McLeod v. Canadian Northern R. W. Co.*, 18 O. L. R. 616.

The defendants maintained along their line of railway through a farming country a barbed wire boundary fence without any pole, board, or other capping connecting the posts; the plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained, and ran into the fence and received injuries on account of which it had to be killed: Held, that the fence was not inherently dangerous, and therefore the company were not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse: *Plath v. Grand Forks and Kettle River Valley R. W. Co.*, 10 B. C. R. 299.

Under s.-s. 3 of s. 194 of the Railway Act (53 V. c. 28, s. 2), a railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train, and then runs into a barbed wire in another part of the fence, and is so cut by the barbs that it dies. The damages to the animal cannot be said to be "caused by any of the company's trains or engines" unless the animal is actually struck by the train or engine. Dicta of the Judges in *James v. Grand Trunk R. W. Co.*, 1 O. L. R. 127, 31 S. C. R. 420, and decision in *Winspear v. Accident Insurance Co.*, 6 Q. B. D. 42, followed: *McKellar v. Canadian Pacific R. W. Co.*, 14 Man. L. R. 614.

The provisions of 55 & 56 V. c. 27, s. 6, amending s. 197 of the Railway Act, 1888, and requiring at every public road crossing at road level of the railway, the fences on both sides of the crossing and of the track to be turned into the cattle guards, apply to all public road crossings, and not to those in townships only, as is the case of the fencing prescribed by s. 194 of the Railway Act, 1888: *Grand Trunk R. W. Co. v. McKay*, 34 S. C. R. 81, followed. *Grand Trunk R. W. Co. v. Hainer*, 36 S. C. R. 180.

The obligation to maintain fences on each side of their track involves the duty of a continuous watchful inspection, and the company must take notice of its state at all times: *Studer v. Buffalo and Lake Huron R. W. Co.*, 25 U. C. R. 160. Sheep belonging to the plaintiff escaped from his premises on the highway, and thence owing to defects in the fences of the defendants, into lands of theirs, whence they strayed on to the railway track, where they were killed by a passing train: Held, that the defendants were not liable for the loss, the sheep not being lawfully on the highway: *Daniel v. Grand Trunk R. W. Co.*, 11 A. R. 471. It is the duty of the railway company to

make and duly maintain gates at farm crossings with proper fastenings, and the knowledge of the owner of the farm that the fastenings are insufficient, and his failure to notify the company of that fact, will not prevent him from recovering damages from the company if his cattle stray from his farm owing to the insufficiency of the fastenings and are killed or injured. *McMichael v. Grand Trunk R. W. Co.*, 12 O. R. 547, approved: *Dunsford v. Michigan Central R. W. Co.*, 20 A. R. 577. Held, that a railway company are not bound to maintain and keep up fences along their track except as between them and the owners of the adjoining property; and where cattle strayed on to a neighbour's lands, and thence got on the railway track through some bars put up for a farm crossing and were killed: Held, that the railway company were not responsible. *Seem*, that the owner of the land for whose convenience such bars are constructed is bound to see that they are kept up and that the company are not responsible for injury caused by his leaving them open: *McLennan v. Grand Trunk R. W. Co.*, 8 U. C. C. P. 411. Where cattle have wrongfully got upon a railway through the negligence of the owner, the company must still use ordinary care to avoid a collision; and in this case where horses had escaped upon the track through a gate at a farm crossing which the owner had left open, but although they were seen by the engine driver the speed was not slackened and no precaution taken except sounding the whistle, the company were held liable: *Campbell v. Great Western R. W. Co.*, 15 U. C. R. 498.

Damages,
measure
of.

In estimating the damages recoverable for a personal injury caused by negligence, the jury must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation: *Rowley v. London & N. W. Ry. Co.*, L. R. 8 Ex. 221.

The Court thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial unless the plaintiffs accepted a reduced amount: *Curran v. Grand Trunk R. W. Co.*, 25 A. R. 407. The Court being of opinion that damages of \$3,000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept \$1,500: *Collier v. Michigan Central R. W. Co.*, 27 A. R. 630. In an action by a parent to recover damages for the death of his child, there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future capable of being estimated: *Rombough v. Balch*, *Green v. New York and Ottawa R. W. Co.*, 27 A. R. 32. Section 289 of the Dominion Railway Act, 51 Vict. c. 29, giving to any person injured by the failure to observe any of the

provisions of the Act a right of action "for the full amount of damages sustained," is *intra vires*, and the limitation of amount mentioned in the Workman's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section: *Curran v. Grand Trunk R. W. Co.*, 25 A. R. 407.

A railway company is liable in an action for one injured in an accident while a passenger in the company's train, for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury, if the fright was the result of the accident, and was reasonable and natural: *Kirkpatrick v. Canadian Pacific R. W. Co.*, 35 N. B. Reps. 598.

Held, that s. 34 of R. S. O. 1877, c. 165, which fixed a limitation of six months for bringing actions for any damages or injury sustained by reason of any railway, does not apply to an action brought against a railway company for damages for wrongfully taking earth from the plaintiff's land. *Township of Brock v. Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372, followed: *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616. The plaintiff's father was killed on the 16th of February, 1891, by a fall from a bridge, part of a highway which crossed the defendant's line, and had been negligently allowed by them to be out of repair. The action was begun on the 14th Nov., 1891, more than six months after the accident, no letters of administration having been taken out: Held, that this was not "damage sustained by reason of the railway," and that the limitation clauses of the Railway Act did not apply. Held, also, that the provisions of R. S. O. 1887, c. 135, Lord Campbell's Act, are not affected by special legislation of this kind, so that in that view also the action was begun in time. Judgment in 21 O. R. 628, affirmed on other grounds: *Zimmer v. Grand Trunk R. W. Co.*, 19 A. R. 693. The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for railway purposes. *Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, followed: *Essery v. Grand Trunk R. W. Co.*, 21 O. R. 224. A title by possession may be acquired as against a railway company to lands originally obtained by them for railway purposes. *Robbett v. South Eastern R. W. Co.*, 9 Q. B. D. 424, approved: *Erie and Niagara R. W. Co. v. Rousseau*, 17 A. R. 483. Operation of statute in case of lands taken by railway for right of way: *Thompson v. Canada Central R. W. Co.*, 3 O. R. 136. The legislation of the Dominion Parliament forbidding the defendants contracting against liability for their own negligence is not *ultra vires*: *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162. The provincial legislatures have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbeds of railways subject to the provisions of the Railway Act of Canada. *Canadian Pacific R. W. Co. v. Parish of Notre Dame de Banseccours* (1899), A. C. 367, followed: *Grand Trunk R. W. Co. v. Therrien*, 30 S. C. R. 485.

STREET RAILWAYS.

Persons crossing street railway tracks are entitled to assume that the cars running over them will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the street railway company is responsible: *Gosnell v. Toronto R. Co.*, 24 S. C. R. 582; *Ewing v. Toronto R. Co.*, 24 O. R. 694. Accumulation of snow: *Toronto R. Co. v. Toronto*, 24 S. C. R. 589. Driving over a man in broad daylight: *Forwood v. Toronto*, 22 O. R. 351. Car buffers of different heights: *Bond v. Toronto R. Co.*, 22 A. R. 78.

On the trial of an action based on negligence, the jury should be asked to find specially what the negligence of the defendant was that caused the injury. General findings of negligence, unless the same is found to be the direct cause of the injury, will not support a verdict. Where a street railway company have by their charter privileges in regard to the removal of snow from their tracks, and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm, a duty is cast upon the company to exercise their privilege in the first instance in a reasonable and proper way and without negligence: *Mader v. Halifax Electric Tramway Co.*, 26 C. L. T. 188; 37 S. C. R. 94.

The driver of a vehicle injured while crossing a tramway is not guilty of contributory negligence because he did not look to see whether or not a car was approaching, if in fact it was far enough away to enable him to cross the tracks had it been proceeding moderately and prudently (21 Ont. App. R. 553, affirmed); *Toronto Ry. Co. v. Gosnell*, 24 S. C. R. 582.

Injury to passengers and others: *McCormack v. Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 254; *Bell v. Winnipeg Electric Street R. W. Co.*, 15 Man. L. R. 338; *Ricketts v. Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 270; *Preston v. Toronto R. W. Co.*, 6 O. W. R. 786; *Livingstone v. Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 336; *Gallinger v. Toronto R. W. Co.*, 8 O. L. R. 698.

The escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented, so far as it can be done by the exercise of reasonable care and diligence, and the defendants should have put up guards such as were shewn to be in use very generally in the United States and England, to prevent such accidents: *Royal Electric Co v. Heve*, 32 S. C. R. 462; *Hinman v. Winnipeg Electric Street R. W. Co.*, 16 Man. L. R. 16.

An electric tramway company is responsible for injuries occasioned through the fault of a motorman in negligently allowing an open car to come in contact with a passing vehicle, whereby the con-

ductor was injured, as the motorman had "charge and control" of the car within the meaning of the Ontario Workmen's Compensation Act (27 Ont. App. R. 151, affirmed): *Toronto Ry. Co. v. Snell*, 31 S. C. R. 241.

The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window, not followed by the Divisional Court: *Simpson v. Toronto and York Radial R. W. Co.*, 16 O. L. R. 31, 11 O. W. R. 297.

Car leaving track—Injury to passenger—Obligation of carriers for hire—Burden of proof—Breaking of flange in wheel of car—Defect in wheel—Neglect of inspection and testing—Purchase from reputable manufacturer: *Gaiser v. Niagara, St. Catharines and Toronto R. W. Co.*, 14 O. W. R. 42.

WRONGFUL ACT, DEFAULT OR NEGLIGENCE CAUSING DEATH.

By R. S. O. 1897, c. 166 (Lord Campbell's Act) an Act respecting Compensation to the Families of Persons killed by Accidents and in Duels, an action is given to recover damages for the death of any person caused by any wrongful act, neglect, or default.

Such action shall be commenced within twelve months after the death of the deceased: see *Zimmer v. G. T. R.*, 19 A. R. 582.

The negligence is the cause of action, and the death of the person injured does not, under the statute, give rise to a fresh cause of action to the personal representative: *Read v. G. E. R. Co.*, L. R. 3 Q. B. 555.

The jury, in estimating the damages, cannot take into consideration the mental suffering of the survivors or loss of society which they have sustained, but are to award compensation for pecuniary loss alone: *Blake v. Midland Ry. Co.*, 18 Q. B. 93.

In case of a death caused by a tort, no more than one action can be brought against the tortfeasor in behalf of those entitled to indemnity, and such an action brought by one of them, even though the judgment rendered therein does not determine the proportion of the indemnity which the others are to receive, is a bar to subsequent action brought by one of the latter: *Bouthillier v. Central Vermont R. W. Co.*, Q. R. 28 S. C. 472.

In an action by the father of a person whose death was occasioned by the negligence of the defendants, it was held that the plaintiff could not recover funeral and other expenses incurred, as damages in the action: *Toronto Ry. Co. v. Mulvaney*, 38 S. C. R. 327.

In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the

defendant was guilty of actionable negligence, but also either directly or by reasonable inference that such negligence was the cause of the death: *Young v. Owen Sound Dredge Company*, 27 A. R. 649.

An employee on the Intercolonial Railway became a member of the I. R. Assn. to the funds of which the Government contributed annually \$6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant: Held, reserving the judgment of the Exchequer Court (6 Can. Ex. C. R. 276) that the rule of the association was an answer to an action by his widow under art. 1056, C. C., to recover compensation for his death: *The Queen v. Grenier*, 30 S. C. R. 42.

The death of an adopted son, though caused by negligence gives no right of action to the adoptive parent under the Fatal Accidents Act, R. S. O. 1897, c. 166, s. 1, s.-s. 2: *Blayborough v. Brantford Gas Co.*, 18 O. L. R. 243.

Death of beneficiary—Survival of action: *McHugh v. Grand Trunk R. W. Co.*, 21 Occ. N. 581, 2 O. L. R. 600.

Rights of administrator—Rights of relatives—Time limit—Stay of proceedings: *Mummery v. Grand Trunk R. W. Co.*, *Whalls v. Grand Trunk R. W. Co.*, 21 Occ. N. 343, 1 O. L. R. 622.

Status of widow—Grant of administration pendente lite—Workmen's Compensation Act—Negligence—Release of cause of action—Rights of mother—Expectation of benefit—Discovery of fresh evidence—Damages—New trial: *Doyle v. Diamond Flint Glass Co.*, 24 Occ. N. 368, 8 O. L. R. 499, 3 O. W. R. 320, 356, 415, 510, 921.

An action cannot be maintained either under the Fatal Accidents Act, 1864 (commonly called Lord Campbell's Act), or at common law, by a parent for the funeral expenses of a child whose death has been caused by the negligence of another person: *Clarke v. London General Omnibus Co.*, 75 L. J. K. B. 907; (1906), 2 K. B. 648, 95 L. T. 435.

Conflicting claims—Consolidation of actions—Negligence: *Morton v. Grand Trunk R. W. Co.*, 24 Occ. N. 351, 8 O. L. R. 372, 4 O. W. R. 126.

Right to action—Action before grant of administration—Fiat of Surrogate Court Judge: *Dini v. Farquier*, 24 Occ. N. 294, 3 O. W. R. 786. (Reversed, 4 O. W. R. 295.)

ACTION FOR NUISANCE.

Where the nuisance is a public one, so as to be an indictable offence, an indictment or information is the proper remedy, and an

action will not lie at the suit of a private person, unless he has sustained special damage by such nuisance beyond that sustained by other persons: *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

The plaintiff must prove his possessory title, the nuisance, and the damage.

If the plaintiff is in possession, whether as owner or otherwise, it is sufficient to prove that he was *possessed* of the premises injured by the nuisance. If the nuisance be of a permanent nature, or injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession: *Beddingfield v. Onslow*, 3 Lev. 209.

The action lies by the reversioner even against his own tenant, and even although the injury is caused by an act done in breach of an express covenant by the defendant.

To erect anything offensive near the house of another, so as to make it useless, is actionable.

The owner of houses occupied by tenants can maintain an action in his own name for damages for and to restrain a nuisance on land of an adjoining owner if the nuisance is practically continuous and permanent: *Park v. White*, 23 O. R. 611.

In case of a public nuisance, where special damage is alleged, the private injury or damage as a ground of action appears.

Whether an act done is a nuisance or not depends not only on the act itself, but on the surrounding circumstances, for what would be a nuisance in one place would not be a nuisance in another: *Sturges v. Bridgman*, 11 Chy. Div. 852.

There is a difference between a nuisance which produces material injury to the property and one which produces merely sensible personal discomfort: *Tipping v. St. Helen's Smelting Co.*, 11 H. L. C. 642.

If, after a highway has been established, anything be newly made so near to it as to be dangerous to those using the highway, this will be unlawful and a nuisance; but a road may be dedicated to the public, subject to the inconvenience or risk arising from its peculiar condition: *Fisher v. Prowse*, 31 L. J. Q. B. 122. Nuisance on a public road: *London v. London St. Ry.*, referred to in *McNab v. Dy-sart*, 22 A. R. 508. See *Ward v. Caledon*, 19 A. R. 69, followed in *Bryce v. Loutit*, 21 A. R. 100. Municipal corporations are responsible for damages caused to travellers by obstructions placed upon the highway by wrongdoers of which the corporation have or ought to have knowledge; and the road is out of repair when by the existence of such obstructions it is rendered unsafe or inconvenient for travel: *Castor v. Township of Uxbridge*, 39 U. C. R. 113. The only rule that can be given is that the public are entitled to have such a road as under all the circumstances they may fairly and reasonably

Nuisance
on public
road.

Removal
of snow
or ice.

"Repair,"
meaning of

demand, and the municipality be called upon to provide: *O'Connor v. Township of Otonabee*, 35 U. C. R. 73. The liability to keep in repair extends to overhanging trees liable to fall upon the road and cause damage to passers by. Where, therefore, defendants' servants in getting materials on land adjoining the road for its repair, felled a tree, which in falling lodged against another tree near the road, and being left there afterwards fell and killed the plaintiff's wife, while passing along the road: Held, that the defendants were liable: *Gilchrist v. Township of Carden*, 26 U. C. C. P. 1. Action for damages occasioned to a street railway by the breaking down of the machinery used in removing a building from one part of the city to another, when crossing the railway track and so impeding their traffic: see *Toronto Street Railway Co. v. Dollery*, 12 A. R. 679. Held, also, that the passing of a by-law by the corporation imposing a duty upon others to keep the sidewalks clear of snow and ice did not create a liability upon themselves: *Ringland v. City of Toronto*, 23 U. C. C. P. 93. The Municipal Act of Ontario makes a corporation if guilty of gross negligence liable for accidents resulting from snow and ice on sidewalks; notice of action in such a case must be given, but may be dispensed with on the trial if the Court is of opinion that there was reasonable excuse for the want of it, and that the corporation had not been prejudiced in its defence: Held, affirming the decision in 23 A. R. 406, that there was sufficient evidence to justify the jury in finding that the appellants had not fulfilled their statutory obligation to keep the streets and sidewalks in repair. *Town of Cornwall v. Derochie*, 24 S. C. R. 301, followed: *City of Kingston v. Drennan*, 27 S. C. R. 46. There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling: *Lazarus v. City of Toronto*, 19 U. C. R. 9. "Gross negligence" in section 606 (2) of the Municipal Act, R. S. O. 1897, c. 223, means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shewn that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time: *Ince v. City of Toronto*, 27 A. R. 410. The word "repair," as used in the Municipal Act with reference to a highway, is a relative term, and if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, i.e., horses whose riders or drivers have entirely lost control of them either in spite of ordinary care or by reason of the want of it. And where the driver of a vehicle lost control of his horses, which ran away and caused the injury for which the action was brought, by their run-

ning a vehicle against a stump in the highway, it was held that the plaintiffs could not recover against the municipality, because notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel: *Foley v. Township of East Flamborough*, 29 O. R. 139. A municipality is liable for damages arising through its negligence to children playing upon the highway, where there is no general law limiting this liability in that regard and no local law prohibiting their playing on the highway, and when their presence is not prejudicial to the ordinary uses of the street for traffic and passage: *Ricketts v. Village of Markdale*, 31 O. R. 610: Held, that the question of contributory negligence was one for the jury and could not have been withdrawn from them: *Maw v. Township of King and Albion*, 8 A. R. 248. The defence of want of the notice of accident required by section 13 of the Municipal Amendment Act, 1894, in an action against a municipal corporation for injuries sustained through a defective sidewalk should be set up in the statement of defence if the statement of claim is silent on the point, and the Judge can then go into the circumstances, if any, which excuse the want or insufficiency of the notice. And where the objection in such a case to the want of notice was not raised until after the evidence was closed a motion for a non-suit was refused: *Longbottom v. City of Toronto*, 27 O. R. 198. The latter part of the clause added to section 531 (1) of the Consolidated Municipal Act, 1892, by 57 Vict. c. 50, s. 13, as amended by 59 Vict. c. 51, s. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served," applies to all cases of non-repair of highways, &c., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks. *Drennan v. City of Kingston*, 23 A. R. 406, discussed: *Aldis v. City of Chatham*, 28 O. R. 525.

Semble, as regards the question whether there was reasonable excuse for omission to give the statutory notice of the accident under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), that what may constitute reasonable excuse is not defined, and must depend very much upon the circumstances of the particular case. Where there is actual knowledge or verbal notice, it may be regarded as an element of the excuse, but something more is required. The fact of the accident by itself is not a reasonable excuse if it is not accompanied by some disabling circumstances. The plaintiff was not misled by anyone into not giving notice, and was under no disability except that of ignorance of the law. *Armstrong v. Canada Atlantic R. W. Co.*, 4 O. L. R. 560, referred to: *O'Connor v. City of Hamilton*, 10 O. L. R. 529.

The notice of the accident required to be given within seven days, thereafter, under s. 606 (3) of the Municipal Act, 1903, 3 Edw. VII.

c. 19. is not dispensed with by reason merely of the defendants not being prejudiced by the omission to give it. There must be some reasonable excuse therefor; the plaintiff's illness, the result of the accident, must render him mentally or physically incapable of doing so: *Anderson v. City of Toronto*, 15 O. L. R. 643, 11 O. W. R. 337.

Electric
light
company

An electric light company will be restrained by injunction from so using their generating station as to cause serious annoyance, by vibration, noise and smell, to occupiers of adjoining premises. Such an annoyance is not to be excused on the ground that the defendant is making an ordinary and reasonable use of the land, nor on the ground that the annoyance is temporary and occasional: *Knight v. Isle of Wight Electric Light and Power Co.*, 73 L. J. Ch. 299; 90 L. T. 410; 68 J. P. 266; 2 L. G. R. 390; 20 T. L. R. 173; 2 L. G. R. 390.

A municipal council has a right to have it decided, as against a private person, whether or not certain land is a public highway, and whether such person has a right to obstruct the road: *Toronto v. Lorsch*, 24 O. R. 227.

Where the obstruction is lawful, it may give rise to an action upon proof that it was concealed and the plaintiff invited to pass near it: *Corby v. Hill*, 4 C. B. N. S. 556.

The action may be brought either against the person who originally occasioned the nuisance, or against his alienee who permits it to be continued; but a request to the alienee to remove or abate the nuisance must be proved: *Penruddock's Case*, 5 Rep. 101.

Contractor, liability of.

If a contractor employed to do a lawful act causes a nuisance in the course of his work, the contractor alone, and not the employer, is responsible. In such cases, the action lies only against the person who by himself or his servant committed the injury; and a subcontractor or other person exercising an independent employment is not a servant within the meaning of the rule so as to render his employer liable: *Allen v. Hayward*, 7 Q. B. 960, 975.

Where the employer retains his control over the contractor, and personally interferes and makes himself a party to the act that has occasioned the damage, he becomes liable: *Burgess v. Gray* 1 C. B. 578.

Where the nuisance directly results from the thing contracted to be done the employer is liable: *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767.

Public
body.

Where a public body takes upon itself the making-up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers along the road. That duty cannot be evaded by employing a contractor to

carry out the work. But such duty does not extend to guarding against collateral acts of negligence on the part of the contractor or those employed under him: *Penny v. Wimbledon Urban Council*, 68 L. J. Q. B. 704, (1899) 2 Q. B. 72, 80 L. T. 615, 47 W. R. 565, 63 J. P. 406; *Hill v. Tottenham Urban Council*, 79 L. T. 495.

Although the owner of land, after letting it, is not liable for a nuisance erected by the tenant, yet if he lets or relets the land with a nuisance upon it, or retains control of the repairs, he is liable. In such case in order to fix the tenant with liability there must be in the covenant a contract or undertaking by him to indemnify the landlord against a particular charge which he (the landlord) has been called upon to pay, and the covenant must be construed and the obligation of the tenant determined by looking at the whole terms of the covenant and also at the lease, in order to see whether or not the terms import a contract by the tenant to indemnify the landlord in respect of the particular expense: *Foulger v. Arding*, 70 L. J. K. B. 580, (1901) 2 K. B. 151, 84 L. T. 467, 49 W. R. 442; *Valpy v. St. Leonards Wharf Co.*, 1 L. G. R. 305; 67 J. P. 402.

A lease of a house for a term of years at the yearly rental of £70 contained a covenant by the tenant to pay all "outgoings in respect of the premises." On the expiration of the lease the lessee continued to occupy the premises and pay the rent, a yearly tenancy being thus created:—Held, that the covenant would not be imported into the early tenancy so far as to render the lessee liable for an expense of £70 incurred by the lessor in abating a nuisance on the premises pursuant to a notice from the sanitary authority under the Public Health (London) Act, 1891, as in view of the shortness of the term and the amount of the rent, it was inconsistent with the presumed intention of the parties that the lessee should be liable for so great an expense. *Valpy v. St. Leonard's Wharf Co.*, 1 L. G. R. 305, applied. *Stockdale v. Asherberg*, 72 L. J. W. P. 432, (1903) 1 K. B. 783, distinguished. *Harris v. Hickman*, 73 L. J. K. B. 31, (1904) 1 K. B. 13, 89 L. T. 722, 68 J. P. 65, 2 L. G. R. 1, 20 T. L. R. 18.

Held, that the landlord and tenant were both liable for damages arising from a nuisance (a water closet) erected by the landlord in the house, and continued to be used by the tenant while occupying it: *McCallum v. Hutchinson*, 7 U. C. C. P. 508. An agent merely to let or receive rents is not liable for a nuisance upon the premises let by him: *Quære* as to the liability of a general agent clothed with power to let, repair, and in all respects act for the owner. If the nuisance existed at the time of letting, both tenant and owner are liable. It arises after the tenancy is created the tenant only is responsible: *Regina v. Osler*, 32 U. C. R. 324.

Obstruction to navigation

Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. 2. Where an interference with navigation is established, it is a public nuisance which any one specially injured or damaged by it has a right to remove. 3. While no person has the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable waters, for the purpose of making up a boom of logs, the use thereof in a reasonable manner and for a reasonable period, having regard to local conditions, will not amount to an interference with navigation: *Kennedy v. The "Surrey,"* 10 Ex. C. R. 29, 2 W. L. R. 550, 11 B. C. R. 499.

DEFENCE.

It is a good defence to show that what was *prima facie* a nuisance arose unavoidably from the performance by the defendants, of acts expressly sanctioned by the Legislature; but the defendants will be liable if their acts cause needless injury, or if they do not take reasonable steps within their power for averting such injury.

Where the gist of the action is the consequential damage, the time of limitation begins to run from the accruing of the consequential damage: *Mithaway v. Doig*, 6 A. R. 264; *Gardiner v. Chapman*, 6 O. R. 272.

As to contaminating air, see *Cartwright v. Gray*, 12 Ch. 399.

As to action by tenant, see *Arnold v. White*, 5 Ch. 371.

Livery stable.

Though a livery stable is constructed with all modern improvements for drainage and ventilation of offensive odour therefrom, and the noise made by the horses is a source of annoyance and inconvenience to the neighbouring residents, the proprietor is liable in damages for the injury caused thereby. Gwynne, J., dissenting: *Drysdale v. Dugas*, 26 S. C. R. 20. The owner of a house, of which he is not in the actual occupation, may recover from a person who has placed an offensive nuisance on adjoining premises, damages for the injury sustained in not being able to let the house advantageously in consequence of the nuisance. An owner is liable if he let a building, which required particular care to prevent the occupation from being a nuisance, and the nuisance occurs for want of such care on the part of the tenant: *Smith v. Humbert*, 2 Kerr. 602 (N.B.). Notwithstanding the privileges conferred by its Act of incorporation upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibration produced by its machinery and the diminution of rental and value thereby occasioned. *Drysdale v. Dugas* (26 S. C. R. 20) followed: *Careau v. Montreal Street Ry. Co.*, 31 S. C. R. 463. Per-

Vibration of machinery.

sons having come to live within the scope of a nuisance after its creation does not prevent their complaining of it as a public nuisance: *Regina v. Brewster*, 8 U. C. C. P. 208. In an action on the case by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate to the injury which the plaintiffs may sustain by the possible continuance of the nuisance: *Drew v. Baby*, 1 U. C. R. 438. Measure of damages

Where the nuisance is a continuing one, so that successive actions may be brought, the measure of damages is the amount of injury sustained up to the time of assessment of damages, and the jury may, upon a further action, give substantial damages: *Battishill v. Reid*, 18 C. B. 696.

The defendant's intention in doing the act is to be taken into consideration in assessing the damages: *Emblen v. Myers*, 6 H. & N. 54.

Action for damages to a farm caused by sowing barley, purchased from the defendant, which was mixed with weeds: *McMullen v. Free*, 13 O. R. 57.

An extraordinary drought does not make a case of vis major so as to free those who are charged with the maintenance of a road from liability for accidents caused by its bad condition: *Picard v. Syndics des Chemins & Barriers de la Rive Nord à Quebec* Q. R. 31 S. C. 258.

Trustees or commissioners acting for public purposes without salary or reward are not exempt from the responsibility which is incurred by private individuals: *Coe v. Wise*, L. R. 1 Q. B. 711.

The defendants were held liable in damages because while they were repairing a bridge on a highway, they failed to give warning or put up a barrier, and an accident happened in consequence of a driver's attempt to turn suddenly off the highway when he came to the bridge, his horse at the time being almost beyond his control in consequence of a break in the harness: *Thomas v. Township of North Norwich*, 9 O. L. R. 666.

The injury must be the natural or ordinary consequence of the defendant's wrongful act: *Sharp v. Pocell*, L. R. 7 C. P. 253.

The Attorney-General of the Province is the officer of the Crown who is considered as present in the Courts of the Province to assert the rights of the Crown and of those who are under its protection. The Attorney-General of the Province, and not the Attorney-General of the Dominion, is the proper person to file an information, where the complaint is not of an injury to property vested in the Crown as representing the government of the Dominion, but of the violation of

the rights of the public of the Province, even though such rights are created by an Act of the Parliament of the Dominion. The Attorney-General of the Province is the proper person to file an information in respect of a nuisance caused by interference with a railway. Though the power of making criminal laws is vested in the Dominion Parliament, the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of Justice in the Province: *Attorney-General v. Niagara Falls International Bridge Company*, 20 Chy. 34; 1 Cart. 813.

Music lessons.

The giving of musical lessons by a teacher of music, and practising do not constitute a nuisance to a neighbour. The making of noises on musical instruments to annoy a neighbour is a nuisance: *Christie v. Davey* (1893), 1 Ch. 316.

Trees.

L.'s ancient oak trees overhang W.'s land, and had done so to W.'s knowledge for 15 years. They were not dangerous to life or health. W. cut off the overhanging branches without giving notice to L.: Held, that the overhanging branches constituted a nuisance: *Leminon v. Webb* (1895), A. C. 1.

Poisonous tree injury to cattle: *Pontying v. Nokes* (1894), 2 Q. B. 281.

An action for an injunction will lie against a person who allows the branches to overhang his neighbour's land, whereby his neighbour's trees are damaged: *Smith v. Giddy*, 73 L. J. K. B. 894; (1904) 2 K. B. 448; 91 L. T. 296; 53 W. R. 207; 20 T. L. R. 596.

Trees whose stems are wholly on one side of the boundary of two adjacent properties, but which stand so near the boundary as to extend their roots into the other side of it, are not the common property of both proprietors: *Hetherington v. Galt*, 7 F. 706.

ACTION FOR DISTURBANCE OF SUPPORT OF LAND.

No one has a right to deprive the soil of his neighbour while in its original condition of lateral support, but the plaintiff may acquire a right to the support of the defendant's soil by grant, express or implied: *Partridge v. Scott*, 3 M. & W. 220.

Tenant may maintain action: *McCann v. Chisholm*, 2 O. R. 506. See *Wray v. Morrison*, 9 O. R. 180.

The plaintiff can recover only damage which has already accrued from the interference with his right of support, for he can maintain a fresh action for each subsequent injury he may sustain: *Mitchell v. Darley Main Colliery Co.*, 11 Ap. Cas. 127 D. P.; even although the damage has been accruing continuously from the time of the defendant's act: *Crumbie v. Wallsend Local Board*, 1 Q. B. 503 C. A. (1891). See *Snarr v. Granite*, 1 O. R. 102.

Injunction may be granted before actual damage occurs: *Siddons v. Short*, 2 C. P. D. 572.

ACTION FOR OBSTRUCTION OF LIGHT OR AIR.

Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months. The propriety of such a rule in this Province remarked upon and questioned. *Flight v. Thomas*, 11 A. & E. 688, 8 Cl. & F. 231, followed: *Burnham v. Garvey*, 27 Chy. 80.

By R. S. O. 1897, c. 133, s. 36, no person shall acquire a right by prescription to the access and use of light to or for any dwelling house, workshop, or other building; but this section shall not apply to any such right acquired by twenty years' use before the 5th of March, 1880: see *Carter v. Grassett*, 11 O. R. 331. See now Ont. Statutes, 1910, ch. 34, sec. 37.

In an action for obstructing the plaintiff's lights a fair measure of damages is the cost of making such alterations on the plaintiff's house as will be necessary to obtain the same quantity of light and air as he had enjoyed before the obstruction: *Ring v. Pugsley*, 2 P. & B. 303 (N.B.).

The right to have air to come over a neighbour's land in a particular channel to a particular place, may be established by immemorial user; but in the absence of actual contract no one can claim a right to have the general current of air over his neighbour's property kept uninterrupted: *Chastey v. Ackland* (1897), A. C. 155. See, also, *Aldin v. Latimer* (1894), 2 Ch. 437.

The person who is in the present enjoyment of an access of light to his premises for a special or extraordinary purpose, such as taking photographic portraits, may obtain an injunction against any interference against the access of light, even though he may not have been in the enjoyment of it for that special or extraordinary purpose for the full statutory period of 20 years: *Lazarus v. Artistic Photo. Co.* (1897), 2 Ch. 214.

The rules settled by the Courts in case of the interference with ancient lights are not applicable to a case where, as here, the plaintiff's rights are dependent upon a prior conveyance from the common owner of his lot and the adjoining one, now owned by the defendants, the plaintiff being entitled to receive such access of light through his windows as they had at the time of the severance of his lot from that owned by the defendants: *Simpson v. Eaton*, 15 O. L. R. 161.

ACTION FOR DISTURBANCE OF WAY.

The plaintiff must prove: 1. The possession of certain premises; 2. The existence of a right of way appurtenant thereto; 3. The disturbance of it by the defendant.

The modes of proving a right of way are: 1. By express grant; 2. By user.

By Short Form Act, R. S. O. 1897, c. 118, s. 12, every deed made after 1st July, 1886, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised: see *Maughan v. Casci*, 5 O. R. 518. The cases under Nuisance and Negligence, already cited, relating to highways, should also be referred to as well as the following, which relate to the mode of dedication of a public highway in Ontario.

Dedication of a road in a municipality as a public street or road is sufficiently established by the following facts: 1. Registration by the proprietor of a sub-division plan, and deposit of book of reference on which the road is indicated and described as a street or road. 2. The opening and laying out of the land by the proprietor as a street, and the placing of sidewalks thereon. 3. The free and uninterrupted use of the street by the public for more than ten years. 4. Exploiting of the adjacent land by the proprietor, and selling lots as bounded by a public street. 5. Use of the street by the public as the only direct access to the railway station. 6. Acceptance of the dedication by the public and the municipality—the uninterrupted use of the street being a sufficient acceptance: *Shorey v. Cook*, Q. R. 26 S. C. 203.

The owner had permitted for many years a public road to be used across his land, which he subsequently agreed to sell. No by-law had been passed by the municipality for closing up this road, although a resolution of the council had been passed for the purpose: Held, that a good title was not shewn: *Kronsbiow v. Gage*, 10 Chy. 572.

The proof of a right of way by express grant is a question more of construction than evidence. The right of way by necessity arises by implied grant. If A. grants a tenement surrounded by his own land to B., B. is entitled to the right of way to it through the land of the grantor if such way be absolutely necessary to the right of enjoyment to what is granted. As to the mode of ascertaining the way, see *Pearson v. Spencer*, 1 B. & S. 571. Formerly a right of way not claimed by express grant must have been shewn to have existed from time immemorial, i.e., from the beginning of the reign of Richard I., A.D. 1189. This is called a claim by prescription at common law to distinguish it from a claim by prescription of statute.

By Ont. Statutes, 1910, c. 34, sec. 35, rights of way or water are not to be defeated by shewing only that they began more than twenty years before. When enjoyed over forty years the right is indefeasible. The plaintiff must prove some disturbance by the defendant.

Evidence may be received in contradiction to monuments placed under Survey Act: *Regina v. Cosby*, 21 O. R. 591. Crown lands

survey of record in Crown Lands Department governs on a question of situation of road: *Kenney v. Caldwell*, 21 A. R. 110. Under the Municipal and Surveyors Acts by the filing of a plan and the sale of lots according to it abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they may have become liable to repair: *Roche v. Ryan*, 22 O. R. 107. See *Palmaſtier v. McKibbon*, 21 A. R. 441. A street or road laid out upon a registered plan of a township lot, where there is not an incorporated village, continues to be a private street or road until adopted by the township council: *Skiltzkey v. Cranston*, 22 O. R. 590. See *McIlmurray v. Jenkins*, 22 A. R. 398. Right of city to open roads laid out on plan: *Gooderham v. Toronto*, 25 S. C. R. 247. A mortgagee of land adjoining a highway is a person entitled to pre-emption of such land under Municipal Act: *Brown v. Bushep*, 25 O. R. 612.

In order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an intention to dedicate, *an animus dedicandi* of which the user by the public is evidence and no more, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment: *Chinnock v. Hartley Wintney Rural Council*, 63 J. P. 327.

A deed contained in the habendum clause a reservation to the grantee of a right of way. The deed was not executed by the grantee, but had been accepted by him. It was contended that not having been executed by the grantee, there was no grant of the right of way: Held, that, the plaintiffs, by accepting the deed, were bound by the reservation it contained: *Loyal Prince of Wales Lodge v. Sinfield*, 40 N. S. R. 30.

To establish a right of way the facts must shew a bona fide user of the disputed way for some intelligent and definite purpose and for a period or at times clearly stated: *Glover v. Coleman*, L. R. 10 C. P. 108, and *Carr v. Foster*, 3 Q. B. 581, distinguished. An implied reservation cannot be read into an absolute grant. Facts insufficient to warrant presumption of lost grant: *Quære*, whether temporary non-user will prevent the acquisition of an easement: *Ternan v. Flinn*, 40 N. S. R. 167; *O'Mara v. Eden*, *ib.* 172n.

Unity of ownership or seisin in fee extinguishes all pre-existing easements or private rights of way over one part of the land for the accommodation of another part; and an easement so extinguished can only be revived by a fresh grant, and then the right granted is of a new thing; the severance again of the land in respect of which an easement formerly existed over one part for the benefit of the other does not per se revive the extinguished easement, if the

dominant part is first granted and the servient part retained by the owner who made the severance: *McClellan v. Powassan Lumber Co.*, 15 O. L. R. 67.

A grant of a right of way extends to all licenses of the grantee, even though licenses are not expressly mentioned in the grant: *Baxendale v. North Lambeth Liberal and Radical Club*, 71 L. J. Ch. 806; (1902) 2 Ch. 427; 87 L. T. 16; 50 W. R. 650.

Where there is no exit or entrance at either end there cannot be a public highway: *Bailey v. Jamieson*, 1 C. P. D. 329; *G. T. P. Co. v. Vincent*, 12 W. L. R. 412.

Where there has been long enjoyment of a way in connection with which for many years a payment has been made, the presumption is that such payment is rent, and the burden of establishing that the enjoyment confers an easement lies upon the person who claims it as of right. *Gardner v. Hodgson's Kingston Brewery Co.*, 72 L. J. Ch. 558; (1903) A. C. 229; 88 L. T. 698; 52 W. R. 17.

DEFENCE.

The defendant may, under the defence of the denial of the right, prove that the way was only a way by sufferance during the pleasure of himself and the plaintiff: *Reignolds v. Edwards*, Willes, 282. As evidence of which he may shew that he has kept a gate across the road or that the plaintiff has paid him a compensation for the use of the way. If the way is claimed as a way of necessity, the defendant may shew that the plaintiff can approach the place to which it leads over his own land, and that consequently the way of necessity has ceased: *Holmes v. Garing*, 2 Bing. 76. The defendant may also shew that the right of way has been removed and abandoned by acquiescing in an obstruction for more than twenty years: *Bower v. Hill*, 1 N. C. 555. Or where it is claimed under the Act the defendant may shew an acquiescence in an interruption for one year of the twenty or forty relied on by the plaintiff: *Glover v. Coleman*, L. R. 10 C. P. 108. The defendant may also prove an extinguishment of the right by a substantial alteration in the original object of the grant of the way. Unity of possession extinguishes an easement: *Clayton v. Corby*, 2 Q. B. 813. The action cannot be brought by a reversioner unless the disturbance be of a permanent character, so as to threaten an injury to the freehold. A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations is suspended: *Stothart v. Hilliard*, 19 O. R. 542. The Ontario Act (R. S. O. 1877, c. 108), reducing the period of limitation to ten years does not apply to the interruption of an easement such as a right

to a way in *alieno solo*, in this case a lane which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction: *Mytel v. Doyle*, 45 U. C. R. 65. When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription. A farm crossing provided by a railway company may be used by any person who after the severance becomes the owner of portions of the farm on both sides of the line of the railway and has a right of access, to the crossing. A right of way may be acquired although the dominant tenement is not contiguous to the servient tenement: *Guthrie v. Canadian Pacific R. W. Co.*, 27 A. R. 64. The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damages from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time: *Kerr v. Atlantic and North-West Ry. Co.*, 25 S. C. R. 197; *Attrill v. Platt*, 10 S. C. R. 425. Abandonment of an easement may be shewn not only from facts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. *Bell v. Golding*, 23 A. R. 485. A right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purposes in respect to any other property: *Purdum v. Robinson*, 30 S. C. R. 64; *Hart v. McMullen*, 30 S. C. R. 245. There is a difference between a *cul de sac* in the city and in the country, much stronger acts being required to establish a public highway by dedication in the latter than in the former. The mere acting so as to lead persons to suppose that a way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction: *Hawkins v. Baker et al.*, 1 Old. 419 (N.S.) Liability is not in all cases to be inferred from enactments placing the highway under defendant's control. The obligation must have been imposed on or transferred to defendant: *Walker v. The City of Halifax*, 4 R. & G. 371. The right to a way of necessity does not cease by the subsequent construction of a public road by which there is less convenient access to the land: *Gardner v. Horne*, 2 Thom. 278. The accretions by the action of the elements of soil to the lands of a private individual bordering on a navigable lake belong to the owner; and in the same way accretions to a public highway are taken to be and form part of such highway: *Stanley v. Perry*, 23 Gr. 507; S. C. 2 A. R. 195, 3 S. C. R. 356. *Semble*, a common and public highway is not an incumbrance within the meaning of the covenant for quiet enjoyment: *Moore v. Boulton*, 10 U. C. R. 140. Where a right of way is granted as appurtenant to certain lands there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it

is appurtenant by every part owner of the property, but such part ownership confers no right to further burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed: *Telfer v. Jacobs*, 16 O. R. 35. A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot, generally apart from his ownership and use of the lot: *Robinson v. Purdom*, 26 A. R. 95, 30 S. C. R. 64. A way of necessity is founded on necessity, not on convenience, and the foundation of the right is the fact that the lands conveyed are physically inaccessible except by passing over other lands: *Fitchett v. Mellow*, 29 O. R. 6. *Seemle*, that a way of necessity to a purchaser of land is the one most convenient to the grantee by the shortest cut over the lands of the grantor; but that the right to select such a way is qualified by the effect which the selection of a particular line would have upon the interests and convenience of the grantor. *Fielder v. Bannister*, 8 Chy. 257. Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts: *Briggs v. Semmens*, 19 O. R. 522. Abandonment of an easement may be shewn not only from acts done by the owner of the dominant tenement, indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. A conveyance made in pursuance of the Short Forms Act of a lot according to a registered plan upon which a lane is laid out, does not pass any interest in the lane, when it has not in fact been opened on the land and has not been used or enjoyed with the lot in question: *Bell v. Goulding*, 23 A. R. 485. Under C. S. U. C. c. 54, s. 313 (R. S. O. 1887, c. 174, s. 486), streets laid out in the original plan of a town by the Crown surveyor are public highways, though not staked out upon the ground and never opened or used: *Regina v. Great Western R. W. Co.*, 21 U. C. R. 555. A man laying out village lots with streets to bound the lots, and selling according to such a plan: Held, bound by the dedication of the streets unless rebutted by other evidence: *O'Brien v. Village of Trenton*, 6 U. C. C. P. 350. The registration of a plan of a sub-division of a town lot, and sales made in accordance with it, does not constitute a dedication of the lands thereon to the public: *In re Morton and City of St. Thomas*, 6 A. R. 323. Under the Municipal and Surveyors' Acts by the filing of a plan and the sale of lots according to it abutting on a street, the property in the street becomes vested in the municipality, although they have done no corporate act by which they have become liable to repair: *Roche v. Ryan*, 22 O. R. 107: Held, reversing the decisions in 21 O. R. 120, and 19 A. R. 641, that the right vested in the municipal corporation by 46 Vict. c. 18

(O.) to convert into a public highway a road laid out by a private person on his property can be exercised only in respect to private roads to the use of which the owners of property abutting thereon were entitled: *Gooderham v. City of Toronto*, 25 S. C. R. 246. The mere fact of the owner of lands selling them in lots according to a plan shewing streets and lanes adjoining the several lots, does not bind him to continue such streets and lanes unless a purchaser is materially inconvenienced by the closing of any of them. *Carey v. City of Toronto*, 11 A. R. 416, 14 S. C. R. 172. The placing of a gate across a travelled road after the public have enjoyed it for upwards of twenty years can never abolish a highway. *Semble*, that a gate being kept across a road is not in any case conclusive as to the road being a public one; a right may have been reserved to put it there to prevent cattle straying: *Johnstone v. Boyle*, 8 U. C. R. 142. A dedication takes effect from the intention of the person making it, and the merely opening or widening a street for the convenience or benefit of the person doing it, and permitting the public to use it, will not constitute a dedication. The question of dedication or no dedication must be left as a question of fact for the jury: *Belford v. Haynes*, 7 U. C. R. 464: Held, that the user of the road in question for thirty years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a paying out by him so that the road under C. S. U. C. c. 54, s. 336, was vested in the municipality: *Nytton v. Duck*, 26 U. C. R. 61. The power of a municipal council to close up a road under section 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open to the applicant is upon the corporation: *Re Adams and Township of East Whitby*, 2 O. R. 473. See *Ward v. Great Western R. W. Co.*, 13 U. C. R. 315; *Small v. Grand Trunk R. W. Co.*, 15 U. C. R. 283; *Jarvis v. Great Western R. W. Co.*, 8 U. C. C. P. 115; *Brown v. Toronto and Nipissing R. W. Co.*, 26 U. C. C. P. 206; *Hamilton and Brock Road Co. v. Great Western R. W. Co.*, 17 U. C. R. 567; *Pewes v. Hall*, 29 U. C. R. 472; *Baird v. Wilson*, 22 U. C. C. P. 491.

The effect of sec. 110 of the Registry Act, R. S. O. 1897, c. 136, whereby after a plan has been registered and a sale or sales made thereunder, the plan is binding upon the persons so registering it, is that it is not irrevocably so, but it may be amended or altered on a proper case being made out. Notice of any proposed amendment or alteration must be given to all purchasers thereunder, who are

entitled to oppose the amendment or alteration. Such application may be made, not only by the person registering the plan, but also by a purchaser or anyone claiming under him; but when it is sought to close a lane laid out on a plan, the soil of which remains in the person registering it, a purchaser seeking to close the lane must shew that he represents the title of the person who registers.

Where, therefore, an application was made by a purchaser of lands laid out on a plan situated in a city to close a private lane laid out thereon, and the applicants failed to shew that they had acquired the title to the soil in the lane, the application was refused: *In re Hamilton Terminal Railway Co. and Laura Whipple*, 14 O. L. R. 117.

ACTION FOR DISTURBANCE OF WATERCOURSE.

The plaintiff must prove: 1. The possession of a mill, backwater, or other tenement in respect of which the right of water is enjoyed; 2. The right to the water; 3. The disturbance; 4. The damage.

Having regard to Lord Blackburn's examination of *Bickett v. Morris* in *Orr Ewing v. Colquhoun*, 2 App. Cas. 839 at p. 852 *et seq.*, and the remarks of Fitzgibbon and Barry, L.JJ., in *Belfast Rope Works Co. v. Boyd*, 21 L. R. Ir. 560, the law is not that any sensible interference with the bed of a stream is *per se* actionable, but that there must be either actual damage, or a reasonable possibility of damage, to give a good cause of action; and that in determining whether the defendant has discharged the onus, regard must be had to the circumstances of the case: Held, further that in this particular case the defendant had discharged the onus, having regard to the evidence taken since the trial by leave of the full Court: *West Kootenay Power and Light Co. v. City of Nelson*, 12 B. C. R. 34, 3 W. L. R. 239.

A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner notwithstanding that, at low tide, it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell v. The Corporation of Quebec* (5 App. Cas. 84), followed. Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein: *Steadman v. Robertson* (18 N. B. Rep. 580), and *The Queen v. Robertson* (6 Can. S. C. R. 52), referred to: *In re Provincial Fisheries* (26 Can. S. C. R. 444 (1898), A. C. 700), discussed: *Atty.-Gen. of Quebec v. Fraser*, *Atty.-Gen. of Quebec v. Adams*, 37 S. C. R. 577.

The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the *alveus* of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of lands bordering thereon to the bed of such waters, *ad medium filum aquæ*; whereas in this province such public rights in all rivers navigable in fact have been deemed always existent in the Crown *ex jure naturæ*, so that the title in the bed thereof remained in the Crown after it had made grants of lands bordering upon the banks of such rivers, the doctrine of *ad medium filum aquæ* not applying thereto.

Where a river is navigable in its general character, natural interruptions to navigation at some part of it, which can be readily overcome, do not prevent it from being deemed a navigable river at such parts: *Keewatin Power Co. v. Town of Kenora*, and *Hudson's Bay Co. v. Town of Kenora*, 13 O. L. R. 237.

The common law of England relative to property and civil rights—as introduced into this province in 1792, now enacted in R. S. O. 1897 c. 111, s. 1—except in so far as repealed by Imperial legislation having force in this province, or by provincial enactments, is the rule for the decision of the same. Where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas, if non-tidal, whether navigable or not, the title in the bed *ad medium filum aquæ* is presumed *prima facie* to be in the riparian proprietor: *Keewatin Power Co. v. Town of Kenora*, *Hudson's Bay Co. v. Town of Kenora*, 16 O. L. R. 184, 110 W. R. 266.*

Held, that upon the true construction of the grant, and having regard to the provisions of s. 31 of the Surveys Act, R. S. O. 1897, c. 181, the river formed the northerly boundary, and the lot did not extend *usque ad filum aquæ*: *Robertson v. Watson* (1874), 27 C. P. 579, 599, followed: Held, also, that the question whether the river at and above and below the *locus in quo* was navigable or unnavigable need not be determined, in view of the decision of the Court of Appeal in *Keewatin Power Co. v. Town of Kenora* (1908), 11 O. W. R. 266.

The plaintiff claimed as part of lot 5 a bar or deposit of gravel and sand below the bank of the river. This sand-bar as to vegetation retained the characteristics of a bed of the stream; for the greater part of the year it was entirely covered with water, and during the remainder was frequently under water, while at times of freshets the water covered it to a depth of 25 or 30 feet, and sometimes overflowed the bank, which was of at least that height: Held, that the

* Reference to Legislation of 1910, in addenda.

bar had not become land formed by alluvion, but was still part of the bed of the river. *Hindson v. Ashby* (1896), 1 Ch. 78; (1896), 2 Ch. 1, followed: *Williams v. Pickard*, 15 O. L. R. 655.

In ascertaining the rights of persons in an artificial watercourse the Court must take into account—first, the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; and thirdly, the mode in which it has been actually used and enjoyed: *Baily v. Clarke*, 71 L. J. Ch. 369; (1902) 1 Ch. 649; 86 L. T. 309; 50 W. R. 511.

The rule in *Dudden v. Clutton Union* (26 L. J. Ex. 146, 1 H. & N. 627), that the owner of a source of a spring may not destroy the natural flow from the spring into the course of the stream fed by the spring, is not affected by the circumstances that at some remote date the issuing point of the spring has been built over, and an artificial channel formed for the passage of the water. *Mostyn v. Atherton*, 68 L. J. Ch. 629; (1899) 2 Ch. 360; 81 L. T. 356; 48 W. R. 168. As the defendants were dealing unreasonably with the water of the stream, so as to visibly and materially diminish the quantity of water coming down, and also polluting the water: Held, that the plaintiffs were therefore entitled to succeed, even without proof of actual damage, on the general principles of law as to the rights of the riparian owner laid down in *Sampson v. Hoddinott* (26 L. J. C. P. 148; 1 C. B. (N.S.) 590), and *Wood v. Waud* (18 L. J. Ex. 305; 3 Ex. 748): *Sharp v. Wilson*, 93 L. T. 155; 21 T. L. R. 679. By the general law applicable to running streams every riparian proprietor has a right to the ordinary use of the water flowing past his land; and he may also, provided that he does not interfere with the rights of other proprietors below or above him, dam up the stream for the purpose of a mill: *White v. White*, 75 L. J. P. C. 14; (1906) A. C. 72; 94 L. T. 65.

The right to the use of the flow of water, in its natural course, is not an easement, but is inseparably connected with, and inherent in the property in the land. It is parcel of the inheritance and passes with it. The rights of a riparian owner or occupant, with respect to the water of a stream, cannot be severed and conveyed in gross, so as to enable a third party to sustain an action in relation thereto: *McCann v. Pidgeon*, 40 N. S. R. 356.

A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; and to use it for all ordinary and domestic purposes; he has also a right to the reasonable use of it for commercial or other extraordinary purposes incident to the enjoyment of his property, provided he does not cause material injury or annoyance to other riparian owners: *Brown v. Bathurst Electric and Water Power Co.*, 3 N. B. Eq. 543.

A riparian proprietor has a right to a reasonable use of the water for his domestic purposes and for his cattle, without regard in the case of a deficiency to the interests of proprietors lower down the stream: *Minor v. Gilmour*, 12 Moo. P. C. 156. See *Ellis v. Clemens*, 22 O. R. 216.

The right to use it to the prejudice of any proprietor of land above or below, by throwing back, diverting, or polluting it, is a right for which the claimant must shew a title by contract, prescription, or other adequate authority: *Mason v. Hill*, 5 B. & Ad. 1.

The owner of the banks and bed of a river (not being a navigable one) may sever them and deal with them as with any other real estate: *Elliott v. Baird*, 26 Chy. 549. See *Attrill v. Platt*, 10 S. C. R. 425.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper, to receive all the natural drainage, has not been adopted in the Province of Ontario.

What is a watercourse? considered: *Williams v. Richards*, 23 O. R. 651; *Arthur v. G. T. R.*, 25 O. R. 37.

The owner of the *alveus* of a navigable river, and of the land on both sides of it, upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property. Such a right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage. The public right is not a paramount right, but a right concurrent with that of the riparian owners. *Roy v. Fraser*, 36 N. B. Reps. 113.

Rights of dominant and servient tenements considered: *Oliver v. Lockie*, 26 O. R. 28.

Effect of reservation in favour of Crown of free passage over navigable waters in a water lot: *Cullerton v. Miller*, 26 O. R. 36.

Sections 3 to 6, inclusive, of the Act respecting Mills and Mill Dams (R. S. O. 1897, c. 140), relate to appliances for passing timber.

By section 15, when an action is brought against a millowner for overflow caused by his mill dam, and it appears that the injury was caused by a dam which was built before the purchase of the land by the grantee of the Crown, and before the grant thereof to him, and that the purchaser obtained a reduction of the price of the land, or was otherwise indemnified in consequence of its being so overflowed, then at the trial these facts may be taken into consideration.

By R. S. O., 1897, c. 141, an Act respecting Water Privileges, persons desiring to enter and acquire lands for improving water

privileges may do so in the mode provided by the Act. An application is made to the County Judge. See Stats. 1905, c. 13, s. 13.

By R. S. O., 1897, c. 142, an Act for Protecting the Public Interest in Rivers, Streams, and Creeks, provisions are made allowing the construction of improvements for the purpose of floating down timber and for levying tolls. See also Stats. 1902, c. 20.

By R. S. O., 1897, c. 143, the Saw-logs Driving Act, provision is made for the proper management of driving logs down rivers and streams. See also Stats. 1901, c. 17.

An easement to appropriate the water of a stream in a particular way (as by a dam to turn the water in a particular direction) may be acquired by an exclusive enjoyment for twenty years; and where such a right is once created it is perpetual and passes with the inheritance: *McLean v. Davis*, 6 All. 266 (N.B.). Where damages are claimed for an obstruction to a watercourse, to entitle plaintiff to recover he must shew the whole damages resulted from the acts of the defendant: *Foster v. Fowler*, 2 Thom. 425 (N.S.). In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury whether the benefit derived by the public from the mill is sufficient to outweigh the inconveniences occasioned by the dam: *Rowe v. Titus*, 1 All. 326 (N.B.). Public navigable waters which open for navigation are not subject to prescription by which any private easement may be acquired in respect thereto (12 Ont. App. R. 327, affirmed): *London and Canadian Loan & Agency Co. v. Warin*, 14 S. C. R. 232.

An injury to a watercourse is considered as an injury to a permanent right, and in such a case the Court will grant the plaintiff a new trial, although the probable amount to be recovered by a verdict may not be large: *Applegarth v. Rhymal*, Tay. 590; *Mitchell v. Barry*, 26 U. C. R. 416.

The right of drainage of surface water does not exist *jure naturæ*, and the principles applicable to streams of running water do not extend to the flow of surface water: *Crewson v. Grand Trunk Railway Co.*, 27 U. C. R. 68.

While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from such pond. *Young v. Tucker*, 26 A. R. 162.

It is only when improvements in a stream are made for the express purpose of facilitating the floating of saw logs, lumber and timber, that tolls can be charged for their use under the Rivers and

Streams Act. A mill dam is not such an improvement, and the right of the lumberman conferred by R. S. O. 1887, c. 118, to float saw logs, lumber and timber over it is unaffected by that Act: *In re Little Bob River Dam*, 23 A. R. 177.

Held, that although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down, and a right of passage up and down in Canada, etc., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing, or with the right of the owners of property opposite their respective lands *ad medium filum aquæ*: *Regina v. Robertson*, 6 S. C. R. 52.

In actions in which the King is a party in the construction of grants from the Crown, where there is an ambiguity in respect of the premises, as for instance what is to be considered the bank of a river, other grants from the Crown are admissible to assist in the construction: *Clark v. Bonnycastle*, 3 O. S. 528.

High water mark is the limit of the highest ordinary state of the river, or its average height in its ordinary state after the spring flood has abated, not the highest limit reached in the year: *Plumb v. McCannon*, 32 U. C. R. 8.

The great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and, therefore, any magistrate of this Province has authority to enquire into offences committed on said lakes, although in American waters: *Regina v. Sharp*, 5 P. R. 135.

Ownership of land or water, though not enclosed, gives to the proprietor under the common law the sole and exclusive right to fish, fowl, hunt or shoot, within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable waters. In such case the public can use the water solely for *bona fide* purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting. Where such waters have become navigable owing to artificial works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage: *Beatty v. Davis*, 20 O. R. 373.

The common law rule as to the flux and reflux of the tide being necessary to constitute a navigable river does not apply to our great lakes and rivers: *Gage v. Bates*, 7 C. P. 116. See also *Whelan v. McLachlan*, 16 C. P. 102; *Parker v. Elliott*, 1 C. P. 470.

The owner of a servient tenement, who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging

surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement; and the fact that the burden has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement. The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O. 1887, c. 111, s. 35: *Enor v. Barwell*, 2 Giff. 410, distinguished: *Oliver v. Lockie*, 26 O. R. 28.

There is no distinction in principle between riparian rights on the banks of navigable or tidal, and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream laterally or vertically: *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, followed, and held to be applicable to every country in which the same general law of riparian rights prevails unless excluded by some positive rule or binding authority of the *lex loci*: *North Shore R. W. Co. v. Pion*, 14 App. Cas. 612. See *S. C. sub nom. Pion v. North Shore R. W. Co.*, 14 S. C. R. 677.

A riparian proprietor has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands, but his right is a qualified one and subject to the lawful and reasonable user of the waters by a mill owner above him on the same stream, and this although the user above him may be at times for an extraordinary purpose. *Dickson v. Carnegie*, 1 O. R. 110.

A proprietor of land on a stream has a right to the water flowing past him in its natural course, undiminished in quantity and quality; and nothing short of a grant, or twenty years' use (which presumes a grant) of the water in a particular way and for a special purpose, can entitle some one proprietor on a stream in violation of this right of all, injuriously to divert or pen back the water from or upon the proprietors living above or below him on the stream: *McLaren v. Cook*, 3 U. C. R. 299.

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from perennial living sources. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character: *Beer v. Stroud*, 19 O. R. 10.

When owing to an extraordinary flood a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled at any time before prescriptive right or right by estoppel to keep the stream in its new channel is acquired against

him, to fill in the places washed away, and to turn the stream back to its original channel: *County of York v. Rolls*, 27 A. R. 72.

That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel. The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has been adopted in this province: *McGillivray v. Millin*, 27 U. C. R. 62, *Crewson v. Grand Trunk R. W. Co.*, *ib.* 68, *Darby v. Crowland*, 38 U. C. R. 338, and *Beer v. Stroud*, 19 O. R. 10 considered: *Williams v. Richards*, 38 O. R. 651.

The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom: *Lefebvre v. The Queen*, 1 Ex. C. R. 121.

The cutting of a channel through ice formed on a water lot in a navigable harbour, to enable ice cut outside to be conveyed to the shore of the harbour, is a use of the water lot for the purpose of navigation: and the owner of the water lot, the grant of which was subject to the rights of navigation, cannot interfere with such user: *McDonald v. Lake Simcoe Ice and Cold Storage Co.*, 31 S. C. R. 130.

In their counterclaim the defendants averred that clams were dug out of flats which were in front of the defendants' farm, and were included down to low water mark in a grant from the Crown to the defendants' predecessors in title, 70 years ago. The grant also professed to convey a right of fishing: Held, that the grant of such a right of fishing would be invalid as against other subjects, whatever its force might be as against the Crown. Two elements essential to the establishment of such exclusive right of fishery: (1), proof shewing a user of or a dealing with the right of fishery to the exclusion of others, as a right of property, separate and distinct in itself; (2), the absence of anything to shew that its origin was modern. Unless a several fishery in tidal waters was in being before Magna Charta it cannot be created by subsequent grant. In view of the date of settlement of the province, there could be no appropriation of a several fishery in tidal waters by the Crown or by a private person so as to admit of an effectual grant thereof by the Crown. *Donnelly v. Vroom*, 40 N. S. R. 585.

FERRY.

In an action for disturbing plaintiff's ferry, it is not necessary to prove that defendant either received or claimed any hire or payment:

Burford v. Oliver, Dra. 9. The omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right: *Hickley v. Gildersleeve*, 10 U. C. C. P. 460. Particulars ordered in an action on the case of disturbing a ferry, as to the number of passengers, goods, &c., conveyed: *Ives v. Calvin*, 1 Ch. Ch. 8.

The owner of a ferry cannot maintain an action for loss of traffic caused by the construction of a bridge. The *dictum* of Blackburn, J., in *Reg. v. Cambrina Railway* (40 L. J. Q. B. 169; L. R. 6 Q. B. 422), is overruled by *Hopkins v. Great Northern Railway* (46 L. J. Q. B. 265; 2 Q. B. D. 224); *Dibden v. Skirrow*, 77 L. J. Ch. 107; (1908) 1 Ch. 41; 97 L. T. 658; 71 J. P. 555; 6 L. G. R. 108; 24 T. L. R. 70. See Ontario Statutes, 1909, c. 60.

ACTION FOR INFRINGEMENT OF COPYRIGHT.*

R. S. C., c. 70, the Copyright Act, contains full provisions as to who may obtain copyright and how copyright may be obtained.

COPYRIGHT.

Subjects and conditions of copyright.

Who may
have copy-
right.

4. Any person domiciled in Canada, or in any part of the British possessions, or any citizen of any country which has an international copyright treaty with the United Kingdom, who is the author of any book, map, chart, or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves, or causes to be engraved, etched, or made from his own design, any print, cut, or engraving, and the legal representatives of such person or citizen shall for the term of twenty-eight years from the time of recording the copyright thereof in the manner hereinafter directed, have the sole and exclusive right and liberty of printing, re-printing, publishing, reproducing, and vending, such literary, scientific or artistic work or composition, in whole or in part, and of allowing translations of such work from one language into other languages to be printed or reprinted and sold.

For twenty-eight
years.

Translations.

Duration.

5. In no case shall the sole and exclusive right and liberty in Canada continue to exist after it has expired elsewhere.

Conditions
for obtaining
copyright.

6. The condition for obtaining such copyright shall be that the said literary, scientific, or artistic works shall be printed and published, or reprinted and republished in Canada, or in the case of

* The Exchequer Court of the Dominion has jurisdiction over questions relating to copyrights, patents, and trade marks.

works of art, that they shall be produced or reproduced in Canada, whether they are so published or produced for the first time or contemporaneously with or subsequently to publication or production elsewhere.

7. No literary, scientific or artistic work, which is immoral, licentious, irreligious or treasonable, or seditious, shall be the legitimate subject of such registration or copyright. Exception as to immoral works.

8. Every work of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada, under any Act of Parliament of Canada, or of the Legislature of the late Province of Canada, or of the Legislature of any of the Provinces forming part of Canada, shall, when printed and published, or reprinted and republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall except as hereinafter provided be held to prohibit the importation from the United Kingdom of copies of any such work lawfully printed there. Copyright in Canada of British copyright works. Importation.

2. If any such copyright work is reprinted subsequently to its publication in the United Kingdom, any person who has previously to the date of entry of such work upon the Registers of Copyright, imported any foreign reprints, may dispose of such reprints by sale or otherwise; but the burden of proof of establishing the extent and regularity of the transaction shall in such case be upon such person. Foreign reprints imported may be sold. Burden of proof.

International copyright is governed by 7 and 8 Vict., c. 12.

The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom: *Tuck & Sons v. Priester*, 19 Q. B. D. 629, approved. There is nothing in the Canadian Copyright Act, 1875, or in the International Copyright Acts which conflicts with this view: *Graves v. Gorrie* (1903), A. C. 496.

Section 152 of the Imperial Customs Act, 1876, 39 & 40 V. c. 36, requiring notice to be given to the commissioners of customs of copyright, and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to Table IV. of the Appendix to vol. 3 of R. S. O. 1897. That statement is no part of the enactment of the Legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 5 & 6 V. c. 45, is left to its full operation: *Smiles v. Bedford*, 1 A. R. 133, follow. A certified copy of the entry at Stationers' Hall of an encyclopædia is *prima facie* evidence of ownership under ss. 18 and 19 of the Act of 1842, and it is necessary in making a *prima facie* case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author. An agreement in

writing whereby the plaintiff for value gave certain other persons the right to print and sell a work at not less than certain fixed prices, for the remainder of the term of the copyright, except the last four years thereof, and under which the plates used in printing were delivered over, which with all unsold copies were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiff:—Held, to be a license and not an assignment, and so not to require registration under s. 19 of 5 & 6 V. c. 45 (Imp.): *Black v. Imperial Book Co.*, 8 O. L. R. 9.

The Imperial Statute 49 & 50 Vict. c. 33, intituled "The International Copyright Act, 1886," and the orders in council of the British government giving effect to it, apply to the whole Empire, and are in force in Canada. That statute having ratified the treaty commonly called "The Berne Convention" in regard to literary property; foreign authors belonging to nations which are parties to the treaty have only to conform to the requirements of the statute to preserve their rights as authors in the whole of the British Empire, without being obliged to observe the formalities of the previous English statutes or those of the various colonial statutes. Therefore, they are not obliged to make the registration and deposit of copies required by R. S. C., c. 62, ss. 4 and 9: *Mary v. Hubert*, Q. R. 29 S. C. 334.

Copyright may exist in a catalogue or mere lists of articles for sale: *Collis v. Cater*, 78 L. T. 313.

An author can assign the copyright of a book not yet in existence, and such an assignment may be in the form of an agreement to assign: *Ward, Lock & Co. v. Long*, 75 L. J. Ch. 732; (1906) 2 Ch. 550; 95 L. T. 345; 22 T. L. R. 789.

A sheet of paper perforated so that, when it is placed in a mechanical instrument and made to pass under tubes through which air is forced, a copyright tune is reproduced, is not a copy of a sheet of music so as to constitute an infringement of the copyright within the meaning of the Copyright Act, 1842: *Boosey v. Whight*, 69 L. J. Ch. 66; (1900) 1 Ch. 122; 81 L. T. 571; 48 W. R. 228.

The reporter of a speech, in which the speaker claims no rights, is an "author" within the meaning of the Copyright Act, 1842, and has copyright in his own report: *Walter v. Lane*, 69 L. J. Ch. 699; (1900) A. C. 539; 83 L. T. 289; 49 W. R. 95.

A photographer who has taken a picture for a customer is not entitled, without the consent of the customer, to sell or exhibit copies of the photograph: *McOosh v. Crow*, 5 F. 670.

The registered proprietor of the copyright in a book, to whom a special action on the case against an infringer is given by s. 15 of the Copyright Act, 1842, is also entitled to bring an action against

him under s. 23 in detinue for the copies of the book retained, and also in trover for damages arising from the wrongful conversion. The measure of the damages will be the total amount realized by the sale of the books: *Muddock v. Blackwood*, 67 L. J. Ch. 6; (1898), 1 Ch. 58; 77 L. T. 493; 46 W. R. 166.

The Copyright (Works of Art) Act, 1862, conferring on British subjects and persons resident in British Dominions copyright in pictures, drawings and photographs, is not applicable to any part of the British Dominions outside the United Kingdom: *Graves v. Gorrie*, 72 L. J. P. C. 95; (1903), A. C. 496; 89 L. T. 111; 52 W. R. 113.

The plaintiffs claimed copyright in certain cartoon drawings, and the accompanying titles and letter-press prepared for the plaintiffs by a celebrated artist, and first published simultaneously in the plaintiff's newspaper in the United States and in another newspaper in England owned by one H., under agreement between H. and the plaintiffs, to which the artist was also a party. By the agreement H. was acknowledged to be the owner of the British copyright. H. granted a license to the artist to publish the drawings in the book form in the United Kingdom. Entry was duly made at Stationers' Hall of H.'s ownership of the copyright of his newspaper. Subsequently this copyright was said to have been assigned by H. to H. and Sons, and before this action was brought H. & Sons registered eight copies of the newspaper containing the eight drawings and letter-press in question, and assignments thereof to the plaintiffs. Before this registration the defendants had without the consent of the plaintiffs or their predecessors printed in Canada for the purposes of sale a quantity of pictorial post cards on which were reproduced copies of the eight drawings taken from books published by the artist under the license mentioned, but not registered at Stationers' Hall. The artist was not a British subject, and was not at the time of the preparation of publication of the material in England within any part of the British dominions. None of the material was protected by Canadian copyright: Held, that the effect of the agreements referred to was to vest in the plaintiffs the common law right to copyright in the drawings, and the right was validly transferred to H., who was an "assign" of the artist or author, within the meaning of section 3 of the Imperial Copyright Act, 4 & 5 Vict. c. 45; and the British newspaper was a book within the meaning of that section, and H. became entitled thereunder to statutory copyright in the drawings as part of his book, for when drawings form part of a book they come within the provisions of that Act, and are protected not only as part of the book but as drawings: *Life Publishing Co. v. Rose Publishing Co.*, 12 O. L. R. 1906.

As to copyright in the colonies, see 10 and 11 Vict. c. 95: *Smiles v. Belford*, 1 A. R. 436; *Anglo-Can. v. Winnifrith*, 15 O. R. 164; *Anglo-Can. v. Suckling*, 17 O. R. 239.

A plaintiff must prove, in an action for infringement of copyright, that he was entitled to copyright at the time copyright was granted, and that the requisites of the Act as to deposit of copy, etc., had been complied with.

By section 26 all copies and extracts certified from the Department of Agriculture shall be received in evidence without further proof and without production of the originals.

As to copyright in lectures, see *Abernethy v. Hutchinson*, 3 L. J. O. S. Ch. 209; *Nichols v. Pitman*, 50 L. T. 254.

To create a perfect right under the Copyright Act there should be an assignment in writing of such parts of the book as the owner of the copyright is willing to permit his licensee to publish. The owner may disentitle himself by his conduct to an injunction: *Allen v. Lyon*, 5 O. R. 615. See *The Canada Publishing Co. v. Gage*, 11 S. C. R. 306; *Lancefield v. Anglo-Can. Music Assn.*, 26 O. R. 457. Circulars: *Church v. Linton*, 25 O. R. 131.

The word proprietor in section 24 means the person who is the present owner of the work. *Dictum of Cockburn*, L. C. J., in *Wood v. Boosey*, L. R. 2 Q. B. 340, not followed. *Weldon v. Dicks*, 10 Ch. D. 247, and *Liverpool General Brokers' Association v. Commercial Press Telegram Bureau* (1897), 2 Q. B. 1, followed: *Morang v. Publishers' Syndicate*, 32 O. R. 393. The purely commercial or business character of a composition or a compilation does not oust the right to protection of copyright, if time, labour and experience have been devoted to its production: *Church v. Linton*, 25 O. R. 131. Section 5 of C. S. C. section 81 is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for an infringement of it: *Griffin v. Kingston and Pembroke R. W. Co.*, 17 O. R. 660. Held, affirming 23 Gr. 590, that it is not necessary for the author of a book who has duly copyrighted the work in England under 5 & 6 Vict. c. 45 to copyright it in Canada under the Copyright Act of 1875 with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of printed copies from a foreign country he must copyright the book in Canada: *Smiles v. Belford*, 1 A. R. 436. The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted works therefor: *Garland v. Gemmill*, 14 S. C. R. 321. There is a very clear distinction to be observed in the Copyright Act, R. S. C. c. 62, between works which are of prior British copyright and those which are of prior Canadian copyright. If

there is a prior British copyright, and thereafter Canadian copyright is obtained by the production of the work, then by section 6 that local copyright is subject to be invaded by the importation of lawful British reprints. But if the Canadian copyright is first on the part of the author or his assigns, then under section 4 the monopoly is secured from all outside importations: *Anglo-Canadian Music Publishers' Association (Limited) v. Suckling*, 17 O. R. 239. A person resident in England who procures a book for valuable consideration to be compiled for him, the compiler not reserving his rights, is the proprietor thereof, and entitled either personally or through an agent in Canada to copyright under the Copyright Act, R. S. C. c. 62. Printing and publishing the book from stereotype plates imported into Canada is a sufficient "printing" within the meaning of the Act, though no typographical work is done in preparation of the copies. American reprints of the plaintiff's copyright book, added as an appendix to American reprints of the Bible imported into Canada, were held to be a violation of the plaintiff's rights: *Frowde v. Parrish*, 27 O. R. 526, 23 A. R. 728.

Held, that section 17 of the Imperial Act to amend the Copyright Act 5 & 6 Victoria, c. 45, prohibiting importation of foreign reprints by any person not being the "proprietor" of the copyright, or some person authorized by him, is now in force in Canada: *Morang v. Publishers' Syndicate*, 32 O. R. 393.

The purely commercial or business character of the composition of a compilation does not oust the right to protection of copyright, if time, labour and experience have been devoted to its production: *Church v. Linton*, 25 O. R. 131.

Section 5 of C. S. C. c. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for the infringement of it: *Griffin v. Kingston & Pembroke Railway Co.*, 17 O. R. 660.

Section 33 of the Copyright Act, R. S. C. 62, does not impose the penalty mentioned therein upon the owner of a Canadian copyright in respect to a musical composition, who has a work printed abroad and inserts notification of the existence of such copyright on copies published in Canada: *Lancefield v. Anglo-Canadian Music Publishing Association, Limited*, 26 O. R. 457.

The Imperial Parliament has sanctioned and reiterated colonial legislation, whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright: *Ib.*

The assignee of a copyright granted in England under 5 & 6 Vict. c. 45 (Imp.) is entitled to copyright of the same work, etc., in

Canada by having it registered at the Department of Agriculture, under the provisions of R. S. C. c. 62, s. 6. Upon suit brought for infringement of such a copyright, the certificate of its registration by the proper officer of the department, together with proof of the assignment of the British copyright, is sufficient evidence of the plaintiff's title to the same. Evidence, in addition to the foregoing, that the work had been entered at Stationers' Hall, London, Eng., entitles the plaintiff to his remedy under the Imperial Act: *Anglo-Canadian Music Publishers Association v. Dupuis*, Q. R. 27 S. C. 485.

ACTION FOR INFRINGEMENT OF TRADE MARK

See Dominion Acts, as to Exchequer Court. (R. S. C. c. 140, s. 23.)

The Trade Mark and Design Act, R. S. C. c. 71, contains the following provisions:

4. In this part unless the context otherwise requires:—

Defini-
tions.

(a) "General trade mark" means a trade mark used in connection with the sale of various articles in which a proprietor deals in his trade, business occupation, or calling generally;

(b) "Specific trade mark" means a trade mark used in connection with the sale of a class of merchandise of a particular description.

What shall
be deemed
to be trade
marks.

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation, or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed, or offered for sale by him, applied in any manner whatever, either to such manufacture, product, or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall for the purposes of this Act be considered and known as trade marks.

The principle on which the Court protects trade marks is that it will not permit a party to sell his goods as the goods of another: *McCall v. Theal*, 28 Chy. 48.

Trade marks are provided for by R. S. C. c. 71.

The questions to be determined are:

1. Whether the defendant's mark is a colourable imitation of the plaintiff's mark.

2. Whether the defendants have been selling goods so marked, so as to lead purchasers to believe that they are the plaintiff's goods: *Mitchell v. Henry*, 15 Chy. D. 181 C. A. See *Bush v. Hanson*, 2 Ex. C. R. 557; *De Kuyper v. VanDulken*, 24 S. C. R. 114.

To found an action at law there must have been an intention to deceive and make the goods pass as those of the tradesmen who

had appropriated the marks, and the questions for the jury are: Is the resemblance such as to deceive ordinary persons? Was the mark adopted by the defendant with that intent, and in order to supplant the plaintiff's goods? If the jury find in the affirmative, no special damage need have been proved. It is not necessary that the defendant should be aware that the mark had been appropriated by the plaintiff: *Fox v. Millington*, 3 Myl. & Cr. 338.

It is not necessary to shew that defendant's goods are inferior to the plaintiff's: *Blofield v. Payne*, 4 B. & Ad. 410.

Evidence of prior user is available as a defence: *Partlo v. Todd*, 17 S. C. R. 196. See *Robinson v. Bogle*, 18 O. R. 387.

Want of registration considered: *Carey v. Goss*, 11 O. R. 119.

No one can properly register or retain on the register a trade mark for goods in which he does not deal and has not, at the time of registration, some definite intention to deal: *Butt v. Dunnett*, 68 L. J. Ch. 557; (1899), A. C. 428; 81 L. T. 94.

Where an action is brought to restrain a colourable imitation of the make-up of goods, it must be proved beyond question that the goods are so got up as to be calculated to deceive. No general rule can be laid down and each case must be judged by its own circumstances.

Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the Court (and not for the witness) to decide, after inspection of the exhibits and paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of the goods. It is not sufficient to shew that by a trick or device a retail trader might be able to pass off the goods of one for those of another: *Payton v. Snelling, Lampard & Co.*, 70 L. J. Ch. 644; (1901), A. C. 308; 85 L. T. 287.

It is only a mark or symbol in which property can be acquired and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered as a trade mark under the Trade Mark and Design Act, 1879. A person accused of infringing a registered trade mark may shew that it was in common use before such registration, and therefore could not properly be registered notwithstanding the provision in section 8 of the Act, that the person registering shall have the exclusive right to use the same to designate articles manufactured by him. Where the statute prescribes no means of rectification of a trade mark improperly registered, the Courts may afford relief by way of defence to an action for infringement: *Partlo v. Todd*, *supra*. Property cannot be acquired in marks, etc., known to a particular trade as designating

quality merely, and not in themselves indicating that the goods to which they are affixed are the manufacture of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely, though it might be in a foreign word or word of a dead language. Judgment appealed from (14 Ont. App. R. 444, affirmed): *Partlo v. Todd*, 17 S. C. R. 196. The imitation of labels and wrappers whereby the public are misled and the plaintiff will be restrained as a fraud upon him, and though an imitation will be deemed colourable if it be such that a careful inspection is required to distinguish it, yet a Court will not interfere when ordinary attention would enable a purchaser to discriminate. It is not enough that a careless, inattentive or illiterate purchaser might be deceived by the resemblance: *Johnson et al. v. Parr*, R. E. D. 98 (N.S.).

If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter and while such goods are to be found in the Canadian market, for any one to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade marks, but marks used to comply with the statutes of the country of origin, would not in that respect in any way alter the case. *Quære*, whether any one would in such a case be precluded from acquiring a right in Canada to the exclusive use of such a trade mark, where there was no importation into Canada of goods bearing the prescribed foreign marks: *Gorham Manufacturing Co. v. Ellis*, 8 Ex. C. R. 401.

Where a design is registered as applicable to pattern special and configuration, the registration applies to the design as a whole, and it is protected although in one of these particulars it may not be novel: *Harper v. Wright* (1896), 1 Ch. 142.

Where a retail trader innocently buys and sells a small quantity of goods, which turn out to be an infringement of the trade mark, he will not be liable as a matter of course for the costs of an action for infringement: *American Tobacco Co. v. Quest* (1897), 1 Ch. 630.

There can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception. Where there is no reliable evidence of persons having been actually misled, it is for the Court to determine the question by consideration of the words themselves: *Kerstein v. Cohen*, 11 O. L. R. 450, 7 O. W. R. 247, 8 O. W. R. 934.

In deciding whether a trade mark so resembles another as to be calculated to deceive, visual resemblance is not necessarily the only

thing to be considered; the possibility of confusion to the ear may also be an element. The letter "B" stamped on buttons of braces manufactured by the defendants in the same manner as the plaintiffs' trade mark—the letter "D"—was stamped on the buttons of braces manufactured by them, was held to be an infringement: *Doran v. Hogadore*, 11 O. L. R. 321, 7 O. W. R. 349.

Apart from any consideration as to registered trade marks an action lies at common law to restrain a trader from applying to his goods the name of a place in which they were not manufactured, and where the adoption of such a name tends to confuse his goods in the eyes of the public with those of a rival trader who has made his goods known to the public under a designation including the name of their place of origin or manufacture: *Pabst Brewing Co. v. Ekers*, Q. R. 20 S. C. 20.

A man cannot have a monopoly in a geographical name as such. There must be some secondary meaning connoting character or quality of the produce: *Rose v. McLean*, 27 O. R. 325.

An "invented" word must not only be newly coined in the sense of not being already current in the English language, but must not convey any meaning, or at any rate any obvious meaning to ordinary Englishmen, as distinguished from scholars, until a meaning has been assigned to it. While a word found in the vocabulary of a foreign language may be an "invented" word, a foreign word is not "invented" merely because it is not current in the English language: *Phillipart v. Whiteley*, 77 L. J. Ch. 650; (1908), 2 Ch. 274; 99 L. T. 291; 24 T. L. R. 707.

Where goods are not manufactured, but are the natural product of a particular locality, the name of which necessarily forms part of any real description of the goods, the first user has no exclusive right to call his goods by the name of the place: *Montgomery v. Thompson* (60 L. J. Ch. 757; (1891), A. C. 217) distinguished: *Grand Hotel Company of Caledonia Springs, Ltd., v. Wilson*, 73 L. J. P. C. 1; (1904), A. C. 103; 89 L. T. 456; 52 W. R. 286; 20 T. L. R. 19.

A person cannot be absolutely restrained from carrying on business in his own name; he can only be restrained from carrying on business in his own name without taking reasonable precautions to prevent his business or goods being confounded with those of another person: *Cash Ltd. v. Cash*, 86 L. T. 211; 50 W. R. 289. A word may be at the same time both descriptive and distinctive, but the fact that it retains its *prima facie* descriptive signification increases the difficulty of proving that it is distinctive of the goods of any particular manufacture. If a word is *prima facie* the name of or descriptive of an article, evidence that it is also generally associated with the name of a particular manufacture is not conclusive that

it has become a distinctive word which cannot be used of the same article when made by others without risk of deception: *Burberrys v. Cording*, 100 L. T. 985; 25 T. L. R. 576.

ACTION FOR INFRINGEMENT OF PATENT.

The granting of letters patent to inventors is not the creation of an unjust monopoly nor the concession of a privilege by mere gratuitous favour, but it is a contract between the State and the discoverer, which, in favour of the latter, ought to receive a liberal interpretation: *Barter v. Smith*, 2 Ex. C. R. 455.

An invention is different from a discovery. A discovery is not a subject matter for a patent unless it is an advantage to knowledge, but to known inventions and produces either a new and useful thing or result, or a new and useful mode of producing an old thing or result: *Lane Fox v. Kensington*, C. A. (1892), 3 Ch. 424, at page 428.

The issue of patents is regulated by R. S. C., c. 69.

The patent is proved by producing the patent itself.

By section 50 the seal of the patent office is to be evidence, and all copies or extracts certified under the seal of the patent office shall be received in evidence without further proof and without production of the originals.

The plaintiff must prove that the article was not made by him or his agents. The question of fraudulent intention to infringe is not material; the acts alone are material. The plaintiff must, in the first instance, give some slight evidence of the nature and novelty of the invention. Prior use may avoid a patent, though not generally if the use was not secret.

The issue of a patent of invention raises a presumption in favour of the patentee that the article is a valid subject-matter of a patent. The onus of proof is on the party who attacks the patent to establish the contrary: *Electric Fireproofing Co. v. Electric Fireproofing Co. of Canada*, Q. R. 31 S. C. 34.

The plaintiff must elect whether he will proceed for damages or for an account which the Court may award. He cannot have both: *Betts v. DeVitre*, L. R. 6 H. L. 319; *Beam v. Merner*, 14 O. R. 412; *Ball v. Crompton*, 13 S. C. R. 469.

One who knowingly and for his own end and benefit, and to the damage of the patentee, induces or procures another to infringe a patent, is himself guilty of an infringement: *Copeland-Chatterton Co. v. Hatton*, 26 C. L. T. 528, 10 Ex. C. R. 224.

DEFENCE.

1. Denial of grant.

2. Denial of infringement.

A slight deviation from the process described in the specification, for the purpose of evading the patent, is a fraud. The question is whether the defendant's mode is substantially different.

If a well-known equivalent, chemical or mechanical, is substituted by the defendant for part of the patent invention, it is a mere colourable variation, and therefore an infringement.

The mere insertion of one known article in place of another in a combination is not patentable: *Wisner v. Coulthard*, 22 S. C. R. 178; referring to *Smith v. Goldie*, 9 S. C. R. 46; *Hunter v. Carrick*, 11 S. C. R. 300; *Carter v. Hamilton*, 23 S. C. R. 172.

A patent for a combination of several things, old and new, is infringed by an imitation of that part which is new.

Although all the individual parts of a machine may lack novelty, yet if, by a new combination of them, a decided improvement in the working is attained, that is sufficient to support a patent of invention, and the Courts look with favour upon any slight change whereby an improvement is effected, and find invention in it if they can: *Mattice v. Brandon Machine Works Co.*, 17 Man. L. R. 105.

Where the merit of a patented invention consists in the idea or principle embodied in it, and not merely in the means used to carry the principle into effect, there may be an infringement in the application of the principle by other methods. But where there is no new idea, but only a new combination of old ideas, in the patented article, there is no infringement where only some of the means are used, but a material element is omitted: *Consolidated Car Heating Co. v. Came*, 72 L. J. P. C. 110; (1903), A. C. 509; 89 L. T. 224.

A device resulting in the first useful and successful application of certain known arts and processes in a new combination for manufacturing purposes is not unpatentable for want of novelty, merely because some of the elements so combined have been previously used with other manufacturing devices. Judgment in *Clinton Wire Cloth Co. v. Dominion Fence Co.*, 11 Ex. C. R. 103, affirmed: *Dominion Fence Co. v. Clinton Wire Cloth Co.*, 39 S. C. R. 535.

The mere manufacture and sale of an article, part of a combination patent, is not an infringement of that patent even if the article has no use except for the purpose of infringement: *Townsend v. Howarth* (48 L. J. Ch. 770 n.; 12 Ch. D. 831 n.) followed. *Sikes v. Howarth* (48 L. J. Ch. 769; 12 Ch. D. 826) distinguished. *Dunlop Pneumatic Tire Co. v. Moseley*, 73 L. J. Ch. 417; (1904), 1 Ch. 612; 91 L. T. 40; 52 W. R. 454; 20 T. L. R. 314.

"Utility" in patent law does not mean either abstract utility or comparative utility, or commercial utility.

An invention is useful if it provides a thing better in some respects though worse in others than what is already known. Thus, a mode of producing illuminant appliances more durable than those previously known, or which offers to the public a new choice of material to be used in the production of illuminant appliances, is patentable, although the new appliance is less illuminant than the old one: *Welsbach Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co.*, 69 L. J. Ch. 343; (1900), 1 Ch. 843; 82 L. T. 293; 48 W. R. 362.

3. That the plaintiff is not the first inventor, or that the invention is not new.

4. Public user before patent granted.

If the invention was publicly put in use by the inventor before the grant, it will avoid it, though mere knowledge and publication of it after invention but before grant will not.

The use of an invention by the inventor or by other persons under his direction by way of experiment and in order to bring the invention to perfection, is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary and done in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise the use in public of the device or invention for a time longer than the statute prescribes will be a dedication of it to the public, and when that happens the inventor cannot recall the gift: *Conway v. Ottawa Electric R. W. Co.*, 8 Ex. C. R. 432.

By the true construction of s. 8 of the Canadian Patent Act, R. S. C. c. 61, as amended by 55 & 56 Vict. c. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act: *Dominion Cotton Mills Co. v. General Engineering Co. of Ontario* (1902), A. C. 570.

5. That the specification does not truly describe the invention and how it is to be performed.

Section 13 of R. S. C. c. 69, sets out the requisites for the specification.

Section 29 of the same Act voids a patent if any material allegation in the petition or declaration of the applicant required by the Act in respect of such patent is untrue, or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made when such omission or addi-

tion is wilfully made for the purpose of misleading. If the omission or addition were involuntary, a patent may be allowed to be good to a partial extent.

A specification may be void for uncertainty: *Taylor v. Brandon Mfg. Co.*, 21 A. R. 361.

Sections 31, 32, 33 and 34, deal specially with actions for infringement of patent, and provide that such actions may be brought in any Court of Record having jurisdiction to the amount of the damages claimed in the Province in which the infringement is alleged to have taken place, and which is also that one of the said Courts which holds its sittings nearest to the place of residence or business of the defendant. Power is given to issue injunctions, and where it appears that the defendant used or infringed any part of the invention justly and truly specified and claimed as new, the Court may discriminate.

The defendant is allowed to plead specially, as matter of defence, any fact or default which, by the Act itself or by law, renders the patent void.

6. License to use.

If an interest is transferred in a patent then it requires the consent of both parties to put an end to the transfer, but if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may at his option renounce the license and make the machine patented at his peril: *Noxon v. Noxon*, 24 O. R. 401.

7. Right acquired by prior manufacturer under section 54 of Patent Act: *Fowell v. Chown*, 25 O. R. 71.

The patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by scire facias whether it is vested in the defendant or in a person not a party to the suit: *Smith v. Goldie*, 9 S. C. 46.

Interest in Patent—Licensee.—The holder of patents for improvements in certain agricultural implements agreed to assign to the defendant the exclusive right to sell these implements, but not to manufacture them; and in certain contingencies he also agreed to assign the patents themselves. In fact the patents were invalid for want of novelty, and the defendant having re-assigned any interest he had in the patents claimed the right to manufacture the implements for his own benefit: Held, that the effect of such agreement was not to constitute the defendant a partner, but to give him an interest in the patents; and that he was not a mere licensee of the patentee: *Gillies v. Colton*, 22 Chy. 123.

A patent granting the exclusive right of making, constructing, using, and selling to others to be used, an invention, as described in the speci-

fications setting forth and claiming the method of manufacture, protects not only the process but the thing produced by that process, and an action will lie against any person purchasing and using articles made in derogation of the patent, no matter where they came from, and although the plaintiff cannot have both an account of profits and also damages against the same defendant, he may have both remedies as against different persons (*e.g.*, maker and purchaser), in respect of the same articles. A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles; it is only an expedient to preserve the rights of all parties to the close of the litigation. *Toronto Auer Light Company v. Colling*, 31 O. R. 18.

If letters patent refer to a specification and description of the invention as being filed in the Provincial Secretary's office, they form part of the letters patent, and must be produced in an action for infringement of the patent: *Lusk v. Miller*, Mich. T. 1872 (N.B.). Where the subject of a patent is a new combination of old devices, the patentee cannot import such devices in a manufactured state, and simply apply his combination to them in Canada without violating the prohibition against importation contained in section 28 of the Patent Act, 1872: *Mitchell v. Hancock Inspirator Co.*, 2 Ex. C. R. 539. A patent is good for a combination of old or before-used inventions as well as for an entirely new one, provided the patentee does not claim it as an invention new in all its parts, but merely for the improvement in the combination: *Emery v. Iredale*, *Emery v. Hodge*, 11 U. C. C. P. 106. The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study. The application to an oil pump of the principle of "rolling contact" was held patentable: *Bicknell v. Peterson*, 24 A. R. 427. Though the number of mechanical powers are limited their combinations may be very numerous; and a new combination of previously known implements or elements is the proper subject of a patent: *Patric v. Sylvester*, 23 Gr. 573. An invention consisting of a new and useful combination of well known materials or devices, which produces a result not theretofore so obtained, is a proper subject for a patent: *Toronto Telephone Manufacturing Co. v. Bell Telephone Co.*, 2 Ex. C. R. 495. A new combination of known elements is an invention, and as such is patentable. The person who has devised such new combination has all the rights and privileges of an inventor, even if the novelty consists in a trifling mechanical change, provided, in the latter case, some economic or other result is produced in some way different from what was obtained before: *Mitchell v. Hancock Inspirator Co.*, 2 Ex. C. R. 539. An action for the infringement of a patent should not ordinarily be tried by a jury:

Fermilyea v. Guthrie, 9 P. R. 267. During the existence of a license the licensor cannot dispute the validity of a patent obtained by him and afterwards assigned by him for value to another: *Whiting v. Tuttle*, 17 Gr. 454. Where one who says he is the inventor of anything has had an opportunity to hear it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed: *American Dunlop Tire Co. v. Gould Bicycle Co.*, 6 Ex. C. R. 223. To be entitled to a patent in Canada the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit: *Smith v. Goldie*, 9 S. C. R. 46. It is not illegal to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented as a recommendation of it so long as there is no infringement of a valid existing patent in this country: *Kidder v. Smart, Kidder v. Smart Manufacturing Co.*, 8 O. R. 362. Section 46 of the Patent Act, R. S. C. c. 61, does not authorise one who has with the full consent of the patentee manufactured and sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue thereof, but merely permits him to use and sell the article manufactured by him prior thereto: *Fowell v. Chown*, 25 O. R. 71. Under the general order of the Exchequer Court of Canada bearing date the 5th of December, 1892, and the provisions of section 41 of 15 & 16 Vict. c. 83 (Imp.), the defendant in an action of *scire facias* to repeal a patent for invention is entitled to begin and give evidence in support of his patent, and if the plaintiff produces evidence to impeach the same the defendant is entitled to reply: *The Queen v. LaForce*, 4 Ex. C. R. 14. The expression "any foreign patent" occurring in the concluding clause of section 8 of the Patent Act, "under any circumstances if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires," must be limited to foreign patents in existence when the Canadian patent was granted: *Auer Incandescent Light Manufacturing Co. v. Dreschel*, 6 Ex. C. R. 55, 28 S. C. R. 608. Held, that the delay (without any excuse) of a patentee for the period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in their original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the sole alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a re-issue there), before the

application for a re-issue in this country, is fatal to the validity of the re-issue here: *Kidder v. Smart Manufacturing Co.*, 8 O. R. 362.

The condition in s. 37 of the Patent Act that a patent shall become void if the patentee does not within two years of the date of the patent, or any authorized extension of such period, commence and after such commencement continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada, should be construed to mean that the patentee must not only manufacture his invention in Canada, but manufacture it in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price.

2. It is not a compliance with the above condition that a person who desires to buy or obtain an unconditional title to the patented invention is put in a position to obtain the use of it at a reasonable rental: *Hildreth v. McCormick Manufacturing Co.*, 26 C. L. T. 782.

ACTION FOR DECEIT AND MISREPRESENTATION.

An action will lie in respect of a fraudulent representation made by the defendant to the plaintiff, intended to be acted on by him, and on which he has acted and thereby suffered damage: *Pasley v. Freeman*, 3 T. R. 51.

In an action for deceit the plaintiff must shew misrepresentations amounting to fraud on the part of the defendant, and also misrepresentations sufficiently substantial to warrant the inference that but for such misstatements the plaintiff would not have entered into the contract: *Smith v. Chadwick*, 20 Ch. D. 27, 45, 9 App. Cas. 187; *Derry v. Peek*, 14 App. Cas. 373; *Barrett v. Guesner*, 1 O. W. N. 231.

To entitle a plaintiff to succeed in a passing-off case, he need not prove fraud in the defendant, or give evidence that any single person was deceived. *London General Omnibus Co. v. Lavell* (70 L. J. Ch. 17; (1901) 1 Ch. 133) observed upon: *Bourne v. Swan and Edgar*, 72 L. J. Ch. 168; (1903) 1 Ch. 211; 87 L. T. 589; 51 W. R. 213.

An innocent person who has by the fraudulent misrepresentations of others been induced to take part with them in the commission of a criminal offence—*malum prohibitum*—for which he has been neither tried nor convicted, and who has been induced by those who procured his participation to believe the proceeding neither criminal nor against public policy, can maintain an action against those by whose inducements and false statements he was led to commit it, and recover damages from them for losses he has sustained: *Burrows*

v. *Rhodes*, 68 L. J. Q. B. 545; (1899) 1 Q. B. 816; 80 L. T. 591; 48 W. R. 13; 63 J. P. 532.

A claim in an administration action against the estate of a deceased testator for damages, on the ground that the claimant was induced by the misrepresentation of the testator to purchase from him certain worthless shares in a company, is in the nature of a claim for unliquidated damages in an action for deceit, although the claim is made for the actual price paid for the shares, such a claim falls within the maxim *actio personalis moritur cum persona*, and it is not maintainable: *Duncan, In re; Terry v. Sweeting*, 68 L. J. Ch. 387; 80 L. T. 322; 47 W. R. 379.

An action of deceit will lie against an auctioneer who, being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts. Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected: *Ring v. Potts*, 36 N. B. Reps. 42. To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made considered with reference to the object for which they were made, the knowledge, or means of knowledge, of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural results of his acts; and it must also be established that such fraud was the inducing cause of the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct: *Garland v. Thompson*, 9 O. R. 376. A person who induces another to contract with him as the agent of a third party, by an unqualified assertion that he is such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion being untrue. And costs incurred by such third person in an action against the supposed principal for the recovery of damages may be recovered as damages: *Eckstein v. Whitehead*, 10 U. C. C. P. 65. An action for deceit will lie against a corporation: *Moore v. Ontario Investment Association*, 16 O. R. 269. Demurrer to a statement of claim for damages against a company wherein it was alleged that the plaintiff was induced by fraudulent statements in the annual reports of the company, and in letters written to him by the president, to purchase stock practically from the company, which stock was valueless, overruled with costs: *Ib.* The payment may be ratified and the agency adopted, even though the person receiving the money has by his false representations committed an indictable offence: *Scott v. Bank of New Brunswick*, 23 S. C. R. 277. Where a buyer seeks to recover damages by an action

for deceit against the seller of any property by reason of any false representations made by such seller upon the sale to him of such property, it is not necessary for him in order to maintain such action to return or offer to return the property so sold and in respect of which such representation was made. It is only necessary to do so when the buyer disaffirms and seeks to rescind the sale as being altogether void by reason of the false representation, and to recover back the consideration he has paid or given for the property: *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28. Before the defendant can be charged with deceit in a contract for sale of land, he must be shewn to have contracted as required by the Statute of Frauds, and to have clearly practised or intended the deceit alleged: *Irving v. Merigold*, 3 U. C. R. 272. In case of fraudulent misrepresentation the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damages accrued: *Dickson v. Jarvis*, 5 O. S. 694; *Smith v. McDonald*, 1 R. & G. 245 (N.S.).

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where by error of both parties, and without fraud or deceit, there has been a complete failure of consideration, a Court of Equity will rescind the contract and compel the vendor to return the purchase money: *Cole v. Pope*, 29 S. C. R. 291.

False and fraudulent representations made by a party to a contract after it has been entered into, which has no influence in inducing it, cannot be deemed sufficient grounds for setting aside the contract and recovering money paid pursuant thereto: *McNaughton v. Hudson*, 37 N. S. Reps. 191.

Fraud practised by a third party, even when it produces in the mind of one of the contracting parties a mistake as to the nature of the contract, cannot be invoked by that party as a cause of nullity as against the person with whom he contracts. He has no remedy except against the author of the fraud for damages. Therefore, a person who, deceived by the fraudulent practices of a third person, signs a security when he believes that he is signing a contract of insurance, is bound to fulfil the obligations of it: *Imperial Life Assurance Co. v. Laliberte*, Q. R. 29 S. C. 183.

With respect to the liability of A. for the fraud of another person, A. is liable for the fraudulent representations made by his agent B. in the course of carrying on A.'s business for his benefit.

A person is responsible for a false representation made by him to another on which a third person acts, provided that the representation was made with the direct intent that it should be acted on by such third person in the manner that occasions the injury, and

that the injury be the immediate consequence of the representation: *Garland v. Thompson*, 9 O. R. 376.

The plaintiff must prove actual damage to himself in order to maintain the action: *Hyde v. Bulmer*, 18 L. T. N. C. 293.

In order that a representation be actionable, it must be fraudulently made: *White v. Sage*, 19 A. R. 135.

A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale for misrepresentation as to a matter of title is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit: *Bell v. Macklin*, 15 S. C. R. 576.

The facts that a bill of sale on the face of it absolute is in truth only a mortgage, and that the vendor after the sale is allowed to remain in possession of the goods, are badges of fraud to be weighed by a jury, not conclusive proofs of fraud: *Hunter v. Corbett*, 7 U. C. R. 75. An action on the case in the nature of a conspiracy does not lie against a person supplanting another in the purchase of goods which had first been contracted for by the latter; and in every action on the case in the nature of a conspiracy the declaration must expressly aver malice on the part of defendant: *Davis v. Minor*, 2 U. C. R. 464. Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been plain and made with the knowledge of the facts, and not a matter of mere inference or opinion, and certainly is essential to all estoppels: *McGee v. Kane*, 14 O. R. 226. Defence of fraud practised on a foreign Court to an action on a foreign judgment: see *Woodruff v. McLennan*, 14 A. R. 242. If a deed be obtained by fraud a person innocently taking under it for valuable consideration will be protected: *Mathewson v. Henderson*, 15 U. C. C. P. 90. Of two innocent parties, one of whom must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss: see *Merchants Bank of Canada v. McKay*, 12 O. R. 498; 15 S. C. R. 672. W. obtained from P. an order for \$50 (which was paid) on a statement that he could prosecute him for felony: Held, recoverable on an action brought therefor: *Pasco v. Wegg*, 6 U. C. C. P. 375. To entitle a party to recover damages against one who has been guilty of deceit it is not necessary to shew that the person practising it has benefited thereby; but no action will lie for a false representation unless the person making it knows it to be untrue, and makes it with the intention of inducing the party to whom it is made to act upon it, and he does act upon it and sustains damage in consequence: *French v. Skead*, 24 Chy. 179.

The non-performance of a contractual obligation, when there is deceit on the part of the debtor, is ground for an action by the credi-

tor for the recovery of all the damages which, whether they might reasonably have been in contemplation at the date of the contract or not, are the direct and immediate consequence of it. The difficulty of determining exactly the extent of the injury suffered, and the absence of evidence upon which to fix the amount of damages, are not reasons for not allowing damages to one whose right thereto is established; it is for the Court in such a case to fix the damages: *Zurif v. Great Northern Telegraph Co.*, Q. R. 29 S. C. 460.

ACTION FOR FRAUDULENT PREFERENCE.

The present Ontario Statute relating to Assignments and Preferences by Insolvent Persons is chapter 64, Ontario Statutes, 1910, Section 5 is as follows:

Gifts,
transfers,
etc., made
by insolvent
persons which
defeat or
prejudice
creditors
to be void.

5. (1) Subject to the provisions of section 6, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced, be null and void.

(2) Subject to the provisions of section 6, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, to or for a creditor, with the intent to give such creditor an unjust preference over his other creditors, or over any one or more of them, shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be null and void.

(3) Subject to the provisions of section 6, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach, or set aside such transaction, be presumed *prima facie* to have been made with the intent mentioned in sub-section 2, and to be an unjust preference within the meaning hereof, whether the same is made voluntarily or under pressure.

(4) Subject to the provisions of section 6, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, or over any one or more of them, it shall, if the debtor within sixty days after the trans-

action makes an assignment for the benefit of his creditors, be presumed *prima facie* to have been made with the intent mentioned in sub-section 2, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

(5) The word "creditor," in the fifth and sixth lines of sub-section 2, in the second and third lines of sub-section 3, and in the second and third lines of sub-section 4, shall include any surety, and the indorser of any promissory note or bill of exchange who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into, or such endorsement was given, become a creditor of the person giving the preference within the meaning of these sub-sections.

"Creditor"
for certain
purposes to
include
surety and
endorser.

6. (1) Nothing in the next preceding section shall apply to an assignment made to the sheriff of the county or district in which the debtor resides or carries on business, or with the consent of a majority of his creditors having claims of \$100 and upwards, computed according to the provisions of section 24, to another assignee resident within Ontario, for the purpose of paying rateably and proportionately and without preference or priority, all the creditors of the debtor their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to an innocent purchaser or person; nor to any payment of money to a creditor, nor to any *bona fide* conveyance, assignment, transfer, or delivery over of any goods or property of any kind, which is made in consideration of a present actual *bona fide* payment in money or by way of security for a present actual *bona fide* advance of money, or which is made in consideration of a present actual *bona fide* sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

Assign-
ments for
benefit of
creditors
and *bona
fide* sales,
etc., pro-
tected.

(2) In the case of a valid sale of goods, or other property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor, under circumstances which would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made.

Transfer
to creditor
of consid-
eration for
sale in-
valid.

(3) Every assignment for the general benefit of creditors, which is not void under section 5, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act, and shall be subject in other respects to the provisions thereof, until and unless a subsequent assignment is executed in accordance therewith.

General
assign-
ment not
in accord-
ance with
Act, when
voidable

(4) Where a payment has been made, which is void under this Act, and any valuable security was given up in consideration of the

Security
given up

upon void payment, the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of, the return of the payment.

(5) Nothing herein shall

10 Edw. VII. c. 72. (a) Affect The Wages Act, or prevent a debtor providing for payment of wages due by him in accordance with the provisions of that Act.

Payment of wages protected. (b) Affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the security is restored, or its value made good to the creditor.

Exchange of securities protected. (c) Apply to the substitution in good faith of one security, for another security, for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors, or

Certain securities to be valid (d) Invalidate a security given to a creditor for a pre-existing debt where by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full:

Where it is alleged that a transaction offends against the Assignment Act, R. S. N. S. c. 145, the fact of insolvency must in all cases be proved by the attacking party, but what has to be shewn is not a state of insolvency in the strict legal or commercial acceptation of the term, but the debtor's inability to pay his way, and meet his creditors; *Fawcett v. Faulkner*, 40 N. S. R. 398. See also *Hart v. Allen*, 40 N. S. R. 352.

Where a conveyance by a married woman of alleged separate property is attacked as a device to defraud creditors, the attacking party is not entitled to succeed, where there has been valuable consideration for the security given, by shewing that ultimately the business was judicially declared to be a device to defraud creditors, and also that the party obtaining the security was a relative and had some knowledge of the business in question, and knew that the husband was employed in it. In order to set aside such conveyance it must be clearly shewn that the grantee had knowledge of the "device" at the time the security was given: *Hartlen v. Adams*, 40 N. S. R. 96.

In an action for conversion, the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration, and in fraud of creditors; the defendant justified the taking

under an unregistered lien note given subsequent to the bill of sale:—Held, that the verdict was properly entered for the defendant: *Poitras v. Pelletier*, 38 N. B. R. 63.

Action to set aside marriage settlement. — *Bulmer v. Hunter*, L. R. 8 Eq. 46, distinguished: *Fallis v. Wilson*, 15 O. L. R. 55.

If a debtor makes a payment, believing in good faith and on reasonable grounds that he is, although in fact he is not, legally bound to make it, such payment is not a fraudulent preference. *In re Vautin* (1900), 7 Man. Bank 291, followed. See (1908) 13 O. W. R. 272, where the facts of this case were twice before the Courts. *McDonald v. Curran* (1909), 14 O. W. N. 121.

Where a voluntary settlement was made by husband to wife of half his available assets just before he entered into a speculation of considerable magnitude in connection with supposed oil land, it was held that the property so held by the wife was available for creditors. *Mackay v. Douglas* (1872), L. R. 14 Eq. 106, and *Ex p. Russell* (1882), L. R. 19 Ch. D. 588, followed. *Alexandra Oil Co. v. Cook* (1909), 13 O. W. R. 405; affirmed, 14 O. W. R. 604, 1 O. W. N. 22.

An English bankruptcy carries all the real and personal property of the bankrupt in any part of the British dominions; the theory of the English Bankrupt Acts being that when once a forum had been established for the winding-up of an estate it is expedient that the whole property of the bankrupt should be brought there in order that it may be ratably divided amongst all his creditors; and the assets of the bankrupt having been thus taken away from him, creditors will not be allowed to harass him with unnecessary litigation. The defendants in these actions carried on business in England and Canada, and had creditors in both countries. The defendants became subject to the English bankruptcy laws, and a trustee in bankruptcy was appointed, to whom the plaintiffs presented their claim against the estate of the defendants, which claim included the amount claimed in these actions, which were begun in Ontario. The English Court made an order on the application of the trustee restraining the plaintiffs from further prosecuting these actions; and upon the application of the defendants an order was made in chambers here staying proceedings in them:—Held, affirming 13 P. R. 86, specially referring to *Howell v. Dominion of Canada Oils Refinery Co.*, 37 U. C. R. 484; *Regina v. College of Physicians and Surgeons of Ontario*, 44 U. C. R. 564; *Ellis v. McHenry*, L. R. 6, C. P. 228, that it was the duty of the Court here to aid the English Court; and that the plaintiffs by putting in their claim before the trustee had precluded themselves from objecting to the authority of the English Court, and

therefore that the order made in Chambers here was a proper order under the circumstances, liberty was reserved to the plaintiffs to apply for leave to proceed here after obtaining leave in England: *Maritime Bank v. Stewart*, 13 P. R. 262, 491.

Crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors, is not interfered with by the provision of the Bank Act (R. S. C. c. 120, s. 79), giving note holders a first lien on such assets, the Crown not being named in such enactment: *Liquidators of Maritime Bank v. The Queen*, 17 S. C. R. 657.

The Crown has no priority under an assignment for the general benefit of creditors: *Clarkson v. Attorney-General of Canada*, 15 O. R. 632, 16 A. R. 202.

A creditor who does not execute an assignment but does some act which amounts to acquiescence, is entitled to the benefit of the deed: *Pyper v. McDonald*, 5 L. J. 162.

In an assignment for the benefit of creditors, one preferred creditor was to receive nearly \$300 more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons, amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to, nor named in the deed of assignment:—Held, that as the creditors to be paid by the preferred creditor could not enforce payment from the assignor, who had parted with all his property, they would be hindered and delayed in the recovery of their debts, and the deed was therefore void under the Statute of Elizabeth: *McDonald v. Cummings*, 24 S. C. R.

The precedence given to an assignment for the general benefit of creditors by R. S. O. 1887, c. 124, s. 9, over "all judgments and all executions not completely executed by payment," does not extend to a judgment for alimony registered under R. S. O. 1887, c. 44, s. 30, against the lands of a defendant prior to the registration of an assignment by him; and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant: *Abraham v. Abraham*, 19 O. R. 256; 18 A. R. 436.

"Forthwith"—Reasonable Time.—Held, that the word "forthwith" contained in s. 4 of the Creditors Relief Act, R. S. O. 1887 c. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay." Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was held to be not reasonable: *Maxwell v. Scarfe*, 18 O. R. 529.

A plaintiff suing for a tort is not a creditor within the meaning of the Ontario Statutes as to preferences: *Ashley v. Brown*, 17 A. R. 500; *Gurofski v. Harris*, 27 O. R. 201.

The husband assigns his furniture for valuable consideration to his wife's father. The father subsequently gave it verbally to the wife. The furniture had not been moved from the husband's house: Held, that manual delivery was not necessary to complete the verbal gift to the wife, so that possession was given and taken, and that the gift was complete and good against the husband's creditors: *Kilpin v. Rathley* (1892), 1 Q. B. 582.

The plaintiff with the intention of parting with the possession and property in certain flour made an absolute sale of same, on apparently short terms of credit, to defendant, who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff: Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour: *Baker v. Fisher*, 19 O. R. 650.

A chattel mortgage given as security for a *bona fide* debt cannot be avoided under R. S. O. 1877, c. 118, by simply shewing that the debtor was insolvent and intended to give the mortgagee a preference, but there must be knowledge on the part of the creditor taking the mortgage so as to constitute a concurrence of intent on the part of the debtor and creditor, and the amendment made by 47 Vict. c. 10, s. 3 (O.), does not affect the matter: *Burns v. McKay*, 10 O. R. 167, followed. In this case there was no knowledge on the part of the mortgagee of the debtor's insolvency, and it also appeared that the mortgage was given in pursuance of a previous promise to give security for the debt. The mortgage was therefore upheld: *Quare*, whether where the statute may be defeated by showing an antecedent promise to give security, it must be such as the promise indicated: *McRoberts v. Steinoff*, 11 O. R. 369.

The meaning of R. S. O. 1877, c. 118, as amended by 48 Vict. c. 26, s. 2 (O.), is that a conveyance of property which has the effect of defeating, delaying or prejudicing his creditors, or of giving a preference, is utterly void when made by a person at a time when he is in insolvent circumstances, or unable to pay his debts in full, or knows that he is on the eve of insolvency: *Rae v. McDonald*, 13 O. R. 352.

Pressure will not validate a security unless it be *bona fide* pressure to secure a debt, and without a view to obtaining a preference over the other creditors: *Powell v. Calder*, 8 O. R. 505.

The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference when it is not attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time: *Beattie v. Wenger*, 24 A. R. 72.

A chattel mortgage given in pursuance of a previous agreement therefor, to cover an antecedent debt and advance made at the time of the agreement, both the mortgagor and the mortgagee believing the former to be solvent when the mortgage was actually made, is impeached within the sixty days provided for by s. 2, s.-s. (A) of 54 Vict. c. 20 (O.), amending R. S. O. 1887, c. 124: Held, that the mortgage was valid: *Lawson v. McGeoch*, 22 O. R. 474, 20 A. R. 464.

To avoid a transfer as a fraudulent preference under R. S. O. 1887, c. 124, s. 2, the person to whom it is made must be a creditor in respect of the transaction attacked, and a security for an insolvent who has not paid the debt for which he is security, is not a creditor within the meaning of the Act: *Hope v. Grant*, 20 O. R. 623.

Where a debtor executes a fraudulent conveyance, in respect of which relief in equity may have to be sought, the proper course for the creditor is, not to have the property sold by the sheriff at a great undervalue, and then to come into equity to have the sale confirmed; but to come into equity first to have the conveyance set aside, and the property then sold: *Kerr v. Bain*, 11 Chy. 423.

A creditor cannot take the benefit of the consideration for a conveyance, and at the same time attack the conveyance as fraudulent, and therefore, where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company, it was held that they could not attack the conveyance: *Wood v. Reesor*, 22 A. R. 57, applied: *Rielle v. Reid*, 26 A. R. 54.

Where a creditor simply seeks to have a deed made to his debtor declared fraudulent and void, it is not necessary to allege that the creditor has carried his claim to judgment. In such a case, however, the creditor must sue on behalf of himself and all other creditors: *Longeway v. Mitchell*, 17 Chy. 190. See also *Colver v. Swayze*, 26 Chy. 395.

An insolvent person executed to his son a mortgage for \$1,000, of which \$600 was a sum fraudulently pretended to be due to the mortgagor's wife: Held, that, even if the remaining sum was really due to the mortgagee, his concurrence in the fraud as to the \$600, rendered the mortgage void in toto: *Totten v. Douglas*, 15 Chy. 126; 18 Chy. 341.

Where moneys arising from a feigned sale of goods fraudulent and void as against creditors, were at the time of the commencement of the action by a creditor to set the same aside, in the hands of the nominal purchaser, one of the defendants and a party to the transaction, he was ordered to pay the moneys into Court for distribution among the creditors of the insolvent, and in default of payment by him, it was ordered that execution should issue for that amount: *Masuret v. Stewart*, 22 O. R. 290.

The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. 1887, c. 124, following *Molsons Bank v. Halter*, 18 S. C. R. 88; and where valuable consideration has been given, clear evidence of actual intent to defraud the creditor of the grantor is necessary to have the deed declared void under the statute of Eliz. c. 5: *Hickerson v. Parrington*, 18 A. R. 635.

An assignee for the benefit of creditors takes only such title as his assignor had to the property: *Robinson v. Cook*, 6 O. R. 590.

Held, following *Macdonald v. McCall*, 12 A. R. 593, that a creditor to maintain an action to set aside a mortgage as a fraudulent preference need not be a judgment creditor: *Rae v. McDonald*, 13 O. R. 352.

Proper form of judgment in an action establishing a right to rank on the estate of an insolvent explained: *Grant v. West*, 2 A. R. 533.

A creditor is confined in an action to establish his contested claim to the quantum, and items set out in the affidavit of claim filed with the assignee: *Grant v. West*, 23 A. R. 533.

Where a *bona fide* transaction takes place between a failing debtor and a favoured creditor it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion and afford to the other creditors reasonable satisfaction as to the moral character of the transaction; and if this duty is neglected the favoured creditor may have to bear his own costs of afterwards establishing the transaction if impeached in this Court by the other creditors whom it disappointed: *Healey v. Daniels*, 14 Chy. 633.

The provision of s 20 of the Assignments Act, R. S. O. 1897, c. 147, that "every creditor in his proof of claim shall state whether he holds any security for his claim, or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon," means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security. The substance, not the form of the transaction, is to be looked at to ascertain whether the third party is primarily liable, and if it be found that he is the debtor is then only secondarily liable: *Glanville v. Strachan*, 29 O. R. 373.

The meaning of R. S. O. 1887, c. 124, s. 3, s.-s. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent until and unless it be superseded by an assignment executed with such consent, and the words which occur

through the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction: Held, therefore, that a sheriff who had seized goods of insolvent debtors under execution was not justified in refusing to give them up to the debtors' assignee who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required, by the R. S. O. 1887, c. 124, s. 3, but held, also, that as the goods were covered by a chattel mortgage the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution. The assignee having failed in the action because the mortgagee's rights disentitled him to succeed, and the sheriff having contested the assignee's rights on the other ground which was declared to be untenable, no costs were given to either party: *Anderson v. Glass*, 16 O. R. 592.

An assignment under R. S. O. 1887, c. 124, for the general benefit of creditors made by the members of a trading partnership in the words mentioned in s. 4, vests in the assignee all the properties of each of the partners several as well as joint: *Ball v. Tenant*, 25 O. R. 50, 21 A. R. 602.

An assignment by way of security of the profit expected to be made out of a contract to do work does not come within the Act respecting Assignments and Preferences, and cannot be set aside under that Act: *Blakeley v. Gould*, 24 A. R. 153, 23 S. C. R. 687.

Power to Employ Assignor.—By a deed of assignment for the benefit of creditors the trust was declared to be "to sell and dispose of such portions of the said estate as shall be readily saleable either for cash or credit, or under the power hereinafter contained to carry on the said business . . . and to stand possessed of the said moneys, etc., and all profits and increase arising therefrom in trust to pay," etc., and a subsequent part of the deed provided that the assignee "shall have power to employ the said party of the first part (the insolvent) or any other person in winding up the affairs of the said trust estate in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade": Held, that the provisions above set forth did not invalidate the deed: *Jennings v. Moss*, 10 A. R. 696.

Deputy Resident out of Ontario.—Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing out of the Province, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses: *Tennant v. MacEwan*, 24 A. R. 132.

An assignee for the benefit of creditors may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be: *Macdonald v. Baljour*, 20 A. R. 404.

Remuneration and Disbursements—Indemnity.—An assignee for the benefit of creditors under the Assignment Act cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate unless upon a direct or implied promise of indemnity, but must look to the assets of the estate, and so too with regard to his disbursements in winding up the estate: *Johnson v. Dulmage*, 30 O. R. 233.

A purchase by the assignee for the benefit of creditors of the assets of the estate made by him at the request of the inspectors of the estate after futile efforts to sell at auction and by private tender, and after a circular letter had been sent by the inspector to each creditor stating that the sale would be made unless objection were taken, was set aside, there being evidence that at the time of the purchase the assignee knew of and was negotiating with a possible purchaser to whom he afterwards resold at a large profit, and had not disclosed this information to the inspectors: *Morrison v. Watts*, 19 A. R. 622.

An assignment for the benefit of creditors made to a sheriff under R. S. O. 1887, c. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office. It is not competent to the sheriff to disclaim or decline to act as such assignee: *Brown v. Grove*, 18 O. R. 311.

A sheriff selling lands as assignee for creditors under R. S. O. 1887, c. 124, cannot as selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not as in the latter case agent for both vendor and purchaser: *McIntyre v. Faubert*, 26 O. R. 427.

The duties of an assignee under such an instrument as the one in question in this case are analogous to those of executors and trustees administering estates, and the Court will consider that a year is the proper time within which the sale of the property assigned is to be made where the assignment leaves the time and manner of such sale in the discretion of the assignee. If the sale be not made within a year the onus will be cast upon the assignee of satisfying the Court of his *bona fides* in seeking further delay: *Ontario Bank v. Lamont*, 6 O. R. 147.

Assignments for the general benefit of creditors must be registered unless there is a sufficient change of possession: *Carscallen v. Moodie*, 15 U. C. R. 92; *Haulson v. Joseph*, S. C. P. 45; *Howard v. Mitchell*, 10 U. C. R. 535, 11 U. C. R. 625; *Harris v. Commercial Bank*, 16 U. C. R. 437.

In consideration whether a sufficient change of possession has taken place to satisfy the statute, regard must be had to the nature and purposes of the assignment, and the circumstances of the case, and when made by a merchant for the benefit of his creditors, it is not to be expected that the assignee should remove the goods or take exclusive possession, as in the case of an ordinary sale. The assignor may continue upon the premises, and assist in disposing of the goods, without vitiating the assignment in law, but it is a fact for the jury as evidence to shew that the transfer was colourable: Held, that here the jury was warranted in finding a sufficient change: *Maulson v. Commercial Bank*, 17 U. C. R. 30.

A debtor conveys his lands to a trustee for his creditors, and a schedule annexed purported to contain the whole thereof, but it was afterwards discovered that either designedly or by mistake some of the lands had been omitted: Held, that a bill would lie to correct the schedule on the ground of fraud or mistake: *Gillespie v. Grover*, 3 Chy. 558.

A creditor under a composition deed, either under the Insolvent Act or otherwise, cannot give a general release and subscribe for a particular sum, as being apparently his whole claim, and afterwards advance other demands as not included in this discharge, for this would be a fraud on the other creditors: *Fowler v. Perrin*, 16 U. C. C. P. 358.

The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any mortgage hypothec, lien, or collateral security held by any such creditor as security for any of said debts": Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate that fact to the other creditors at the time of, or before, executing the deed of extension: *Henderson v. Macdonald*, 20 Chy. 334.

The fraud must be some concealment or deception practised by the plaintiff with respect to the very transaction in question; the illegality of the transaction from other reasons is not sufficient: *Green v. Gosden*, 3 M. & Gr. 446. Fraud means moral fraud, and not merely an innocent misrepresentation: *Panama Mail Co. v. Kennedy*, L. R. 2 Q. B. 580; *Moens v. Hayworth*, 10 M. & W. 147; *Burrois v. Leavens*, 29 Chy. 479.

A creditor who assents to and signs the resolution, but before doing so makes a secret bargain with the debtor for payment of his claim in full, is not debarred from suing the debtor for the original

indebtedness upon default in payment of the composition according to the terms of the resolution, the debt not being, in fact, released or otherwise discharged: *Weese v. Banfield*, 22 A. R. 488. Costs withheld from an executor because he had misled plaintiff: *Tenute v. Walsh*, 24 O. R. 309. Fraud or want of consideration for a deed can only be set up by the grantor or those claiming under him: *Hickman v. North British Insurance Co.*, 2 Han. 235 (N.B.). As to pressure, the question to be determined is whether the debtor was actuated solely by a desire to prefer in making the assignment, or whether the request to do so was the moving cause. Decision of Parke, B., in *Van Castell v. Booker*, 2 Ex 691, followed: *Colquhoun v. Seagram*, 11 M. L. R. 339 (Man.).

When the consideration expressed on the face of an assignment is larger than the actual debt due by the debtor to the assignee, it is not necessarily fraudulent. The declared intention to exclude any creditor or class of creditors will not render such an assignment invalid. The assignor continuing in possession of the goods assigned is not a conclusive badge of fraud. Fraud or no fraud is a question that belongs entirely to the jury: *Tarrant v. Sawyer*, 1 Thom. (1st Ed.) 20; (2nd Ed.) 46 (N.S.). A voluntary conveyance of land is void under 13 Eliz. c. 5 (Imp.), as tending to hinder and delay creditors, though the vendor was solvent when it was made, if it results in denuding him of all his property and so rendering him insolvent thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance, and that without first realizing his security. Judgment appealed from (7 B. C. Rep. 189) reversed, Gwynne, J., dissenting: *Sun Life Ass. Co. v. Elliott*, 31 S. C. R. 91. Held, that the preference provided against in the statute is a voluntary preference, and does not apply to a chattel mortgage given under pressure from a creditor, and a mere demand without threatening legal proceedings is a sufficient pressure. *Molsons Bank v. Halter* 18 S. C. R. 88, and *Stephens v. McArthur*, 19 S. C. R. 446, followed: *Fisher v. Brock*, 8 M. L. R. 137 (Man.). Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it is an abuse of the process of the Court. Judgment below, 27 O. R. 423, reserved: *Young v. Ward*, 24 A. R. 147. A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent, and therefore where creditors seized shares in a company allotted to their debtor, in consideration of the conveyance by him of his assets to the company, it was held that they could not attack the conveyance. *Wood v. Reesor*, 22 A. R. 57, applied. Judgment below, 28 O. R. 497, reversed: *Rielle v. Reid*, 26 A. R. 54. The protection of 13 Eliz. c. 5 is not confined to creditors only, but extends to creditors and others who have lawful

actions; and in this case where before the impeached conveyance was made all the moneys secured by a mortgage, subject to which the plaintiff had conveyed the mortgaged lands to the fraudulent grantor, had fallen due, the plaintiff had at the time of the making of the conveyance a lawful action upon the implied contract of his vendee to pay the moneys secured by the mortgage, and this implied contract was sufficiently proved against the fraudulent grantee by proof of the mortgage and of the conveyance by the plaintiff to the fraudulent grantor subject to the mortgage: *Oliver v. McLaughlin*, 24 O. R. 41.

Where a creditor brings his action to set aside as fraudulent a conveyance made by his debtor of his property without first obtaining judgment and execution, he must sue on behalf of all the creditors of the debtor, and in such action his relief will be confined to setting aside the conveyance, leaving him to resort to some independent proceeding to obtain execution against the property comprised in such conveyance: *Oliver v. McLaughlin*, 24 O. R. 41. A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. c. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid if such prior debt has become barred by lapse of time: *Struthers v. Glennie*, 14 O. R. 726. The Court will in a proper case order a deed to be cancelled; or if registered a conveyance of the estate to the person properly entitled; and that although his title may be sufficient as a defence to any action at law: *Markin v. Rabidon*, 6 Chy. 405; 7 Chy. 243. A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of being indebted: *Bank of British North America v. Rattenburg*, 7 Chy. 383. 13 Eliz. c. 5, is directed against fraudulent alienations of property, whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself: *Bain v. Malcolm*, 13 O. R. 444. A debtor sold his property reserving by parol certain future rents to pay a creditor which were sufficient for the purpose; the object was to delay the creditor and to compel him to wait for payment until these rents should accrue and all parties combined for that object. The sale was held wholly void against the creditor, a transaction to delay a creditor being within 13 Eliz. as much as a transaction to defeat him altogether: *Murtha v. McKenna*, 14 Chy. 59. Where a deed is set aside as fraudulent against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property: *Scott v. Hunter*, 14 Chy. 376. Adequacy of consideration is not necessary to maintain a transaction under 13 Eliz.; though the inadequacy may afford some evidence of guilty knowledge: *Carradice v. Currie*, 19 Chy. 108. *Semble*, that since *Wood v. Dixie*, 7 Q. B. 829, a *bona fide* transfer of property made by a debtor to a third party cannot be considered invalid merely because the object of the sale in the mind of both

parties was to defeat an expected execution: *White v. Stevens*, 7 U. C. R. 340. To maintain a sale impeached by creditors, it is not sufficient to prove that the transaction was really intended to pass the property; for as laid down in *Gotticalls v. Mulholland*, 3 E. & A. 194, "although the sale may have been *bona fide* with intent to pass the property, yet if made with intent by vendor and purchaser to defeat and delay creditors, it would be void": *Merchants Bank of Canada v. Clarke*, 18 Chy. 594. Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist the action cannot succeed. The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent: *Car v. Corfield*, 20 O. R. 218. If one purpose of a sale and conveyance is to defeat a creditor, the sale is in equity void as to him: *Scott v. Burnham*, 19 Chy. 234. A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt, and the transferee does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferee: *Mulcahey v. Archibald*, 28 S. C. R. 523. In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the Statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them: *Cox v. Worrall* (26 N. S. Rep. 366) questioned. (See 24 Can. S. C. R. 321): *Taylor v. Cummings*, 27 S. C. R. 589. Voluntary conveyances are void against existing debts, which are thereby defeated or delayed whether the conveyances were fraudulent or not: *Irwin v. Freeman*, 13 Chy. 465. Where a conveyance is voluntary it is only necessary to shew fraudulent intent on the part of the grantor: *Oliver v. McLaughlin*, 24 O. R. 41. A judgment creditor is not a purchaser for value within 27 Eliz. c. 4: *Gillespie v. Van Egmond*, 6 Chy. 533. A voluntary or covinous conveyance under 27 Eliz. c. 4, is voidable only, and is good and valid until avoided: *Harper v. Culbert*, 5 O. R. 152. Since the Judicature Act, in an action by a simple contract creditor claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee: *Gibbons v. Darvill*, 12 P. R. 478. See *Beatty v. Wenger*, 24 A. R. 72.

A judgment recovered at law by the fraudulent acquiescence of the defendant in the action will be inquired into in the Court of Chancery at the instance of a subsequent judgment creditor; although

the rule at law is that only the party to the action can move against the judgment there: *McDonald v. Boice*, 12 Chy. 48. A judgment will be set aside on the motion of a subsequent judgment creditor only when it has been procured by fraud, and the process of the Court thus abused. If a nullity upon any other ground a stranger cannot be prejudiced by it; and if irregular only he has no right to complain: *Balfour v. Ellison*, 3 P. R. 30, 8 L. J. 330. A judgment fraudulent against creditors as to part of the sum included therein is void as against them in toto: *Commercial Bank v. Wilson*, 3 E. & A. 257, 14 Chy. 473. See *Campbell v. Patterson*, *Mader v. McKinnon*, 21 S. C. R. 645. A contract induced by fraud is not void but voidable merely at the option of the party affected or prejudiced thereby; and when the party affected adopts the contract induced by the fraud, the discovery of a new incident of the fraud does not revive the right to repudiate. In this case there being no finding by the jury that the defendant had knowledge of and had waived the fraud, a new trial was directed: *Walton v. Simpson*, 6 O. R. 213. Where a party desires to impeach an instrument on the ground of fraud and extortion, the more convenient course is to institute proceeding in order to annul it, as it is rarely that effect can be given to a defence on such ground in a suit to enforce it: *Kain v. McIntosh*, 10 Chy. 119.

Where a trader who was in insolvent circumstances had given a chattel mortgage on his stock-in-trade to secure a debt, and shortly after executed an assignment in trust for the benefit of his creditors: Held, affirming the judgment appealed from (12 Ont. App. R. 593) that the mortgage was void under the statute, and that certain simple contract creditors of such trader could maintain a suit on behalf of themselves and all other creditors except the mortgagees, to set aside the mortgage, without including the mortgagees as plaintiffs and without attacking the assignment in trust: *McCall v. McDonald*, 12 S. C. R. 247. A mortgage given by a debtor who knows that he is unable to pay all his debts in full, is not void as a preference to the mortgagee over other creditors, if given as a result of pressure and of a *bona fide debt*, and if the mortgagee is not aware of the debtor being in insolvent circumstances: *Molsons Bank v. Halter* (18 Can. S. C. R. 88), and *Stephens v. McArthur* (19 S. C. R. 446), followed. Judgment appealed from (18 Ont. App. R. 159) affirmed: *Gibbons v. McDonald*, 20 S. C. R. 587. Held, overruling *Mader v. McKinnon* (18 Ont. App. R. 646, *sub nom. McKinnon v. Roche*), in so far as *Commercial Bank v. Wilson* was followed, that that case was decided under the Statute of Eliz., and is not now law under the Ontario Statute, and a mortgage may be set aside as to part and maintained as to the remainder, but affirming the judgment of the Court of Appeal on the ground that the evidence shewed the whole of the consideration for M.'s mortgage to be illegal and bad: *Campbell v. Patterson*; *Mader v. McKinnon*, Cass. Dig. (2nd ed.) 122.

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors, it is "an assignment for the general benefit of creditors" under section 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92), and does not require an affidavit of *bona fides*. *Durkee v. Flint* (19 N. S. Rep. 487), approved and followed. *Archibald v. Hubley* (18 Can. S. C. R. 116), distinguished: *Kirk v. Chisholm*, 26 S. C. R. 111. A creditor is not debarred from participating in the benefit of an assignment in trust for the general benefit of creditors by an unsuccessful attempt to have such deed set aside as defective: *Gardner v. Kloepper*, 15 S. C. R. 390; *Grant v. Cameron*, 18 S. C. R. 716.

ACTION FOR DEFAMATION.

The Ontario Act relating to libel and slander is Ont. Stats. 1910, c. 40.*

The Dominion Act respecting libel is R. S. C. c. 146, Criminal Code, sections 317 to 334.

There is a well-known distinction between written and spoken slander. False defamatory words, if spoken, constitute a slander; if written and published, a libel. Words which produce any perceptible injury to the reputation of another are called "defamatory." If false, they are actionable.

In any given case the fact that the words employed by the defendant have perceptibly injured the plaintiff's reputation may be either,

1. Presumed from the nature of the words themselves, or,
2. Proved by evidence of their consequences.

It will be presumed from the nature of the words themselves,

(a) If the words, being written and published, or printed and published, are in any way disparaging to the plaintiff, or tend to bring him into ridicule and contempt.

(b) If the words, being spoken,

1. Charge the plaintiff with the commission of some indictable offence.

2. Impute to the plaintiff a contagious disorder tending to exclude him from society.

3. Are spoken of the plaintiff in the way of his profession or trade, or disparage him in an office of public trust.

In all these cases the words are said to be actionable *per se*, because on the face of them they clearly must have injured the plaintiff's reputation.

* Printed as an appendix.

But in all cases of spoken words the fact that the plaintiff's reputation has been injured thereby must be proved at the trial by evidence of the consequences that directly resulted from their utterance. Such evidence is called "evidence of special damage," as distinguished from that general damage which the law assumes, without express proof to follow from the employment of words actionable *per se*.

The intention or motive with which the words were spoken is, as a rule, immaterial.

Sometimes it is a man's duty to speak fully and freely, and without thought or fear of the consequences; and then the above rule does not apply. The words are privileged by reason of the occasion on which they were employed, and no action lies therefor unless it can be proved that the defendant was actuated by some special spite, or some wicked or malicious motive. In all other cases malice in fact need not be proved at the trial. The words are actionable if false and defamatory, although spoken or published accidentally or inadvertently, or with an honest belief in their truth.

The person defamed has a civil remedy to recover damages, and in some cases he can also proceed criminally by way of information or indictment.

There is no censorship of the press. Any man is free to speak or to write and publish whatever he pleases of another, subject only to this; that he must take the consequences should a jury deem his words defamatory. That is what is meant by the "liberty of the press." *

It is the English law, by virtue of which constitutional liberty of the press exists in Canada, which is applicable to actions for defamation in respect of writings in newspapers and to defences, founded on privilege or fair comments. Under this law, three elements are necessary to enable the writer of a defamatory article to escape civil liability therefor: (1) the writing must be true; (2) it must relate to facts which are of interest to the public, and (3) it must have been published in the public interest and without malice: *Marcotte v. Bolduc*, Q. R. 30 S. C. 222.

The question in each case is, Has the reputation of this individual been appreciably impaired in consequence of the words employed by the defendant? No general rule can be laid down beforehand what words are defamatory and what are not. The injury to the reputation is the gist of the action. In libel the words need not

* An injunction can be obtained to prohibit the publication or republication of libel, or to restrain its sale. Of a trade libel: *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763 C. A. Of other libels, 20 Ch. D. 511. To restrain the utterance of slanderous statements: *Loog v. Bean*, 26 Ch. D. 306 C. A.

necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous.

Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. It is often said that such criticism is privileged. This does not mean that the words are "privileged by reason of the occasion" in the strict legal sense of the term. The defence is really that the words are not defamatory—that criticism is no libel.

What are matters of public interest? The public conduct of every public man. All political, legal, and ecclesiastical matters, therefore, are matters of public concern.

With regard to construction the question is, How would ordinary men, previously unacquainted with the matter, fairly understand the words?

This is clearly a question for the jury, and therefore it is expressly provided (32 Geo. III., c. 69, Fox's Libel Act) that in all criminal actions for libel the jury are to decide the question of libel or no libel, subject to the direction of the Judge. In civil proceedings for libel the practice is the same, save that here, if the Judge thinks that the words cannot possibly bear a defamatory meaning, he may enter a non-suit. If the Judge considers that the words are reasonably susceptible of a defamatory meaning, as well as an innocent one, then it will be a question for the jury. The Judge should not lay down as a matter of law that the publication complained of is or is not a libel. The proper course is for the Judge to define what is a libel in point of law and leave it to the jury to say whether the publication in question falls within that definition.

So, too, in slander the Judge usually decides whether the words are or are not actionable *per se*, and whether the special damage assigned is or is not too remote. If the defendant's words cannot reasonably bear the meaning attached to them by the innuendo, and the Judge thinks the words without that meaning are not actionable, he will stop the case; but where there is any reasonable doubt as to the true construction of the words, the Judge leaves the question to the jury.

The innuendo is the statement by the plaintiff of the construction he puts upon the words himself, and which he endeavours to induce the jury to adopt at the trial.

If, in their ordinary English meaning, the words used would be intelligible, facts must be given in evidence to show that they may have been used in a particular sense on this particular occasion. After that has been done a bystander may be asked, "What did you understand by the expression used?"—not before. If the words are local, or slang, or cant terms, etc., evidence is admissible to explain

their meaning (provided such meaning has been properly alleged in the statement of claim): *Daines v. Hartley*, 3 Exch. 200; *Huber v. Crookall*, 10 O. R. 475.

Where the meaning of the defendant's words is clear or has been ascertained, the next question is, Was the imputation sufficiently definite to injure the plaintiff's reputation? Is it clear that it was the plaintiff to whom he referred? Unless these questions can be answered in the affirmative no action lies.

Publication is the communication of the defamatory words to some third person. It is essential to the plaintiff's case that the defendant's words should be expressed. It is no publication when the words are only communicated to the person defamed; for that cannot injure his reputation. There must be a communication by the defendant to some third person other than the plaintiff. The plaintiff must prove a publication by the defendant in fact. That the third person had the opportunity of reading the libel is not sufficient, if the jury are satisfied that he did not in fact avail himself thereof.

Though composing a libel without publishing it is not actionable, merely publishing it without composing it is actionable.

So again, every sale or delivery of a written or printed copy of a libel is a fresh publication, and every person who sells or gives away a written or printed copy of a libel may be made liable, unless he can satisfy the jury that he was ignorant of the contents.

There is a great difference between libel and slander. The actual publisher of a libel may be an innocent messenger; whereas in every case of a republication of a slander the publisher acts consciously and voluntarily—the repetition is his own act. Therefore if A. slanders B., A. is only liable for the damages which result directly from his own act.

The truth of any defamatory words is, if pleaded, a complete defence in any action of libel or slander (although alone it is not a defence in a criminal trial). The onus of proving that the words are true lies on the defendant. A justification must always be specially pleaded.

In criminal matters the defendant must also prove that it was for the public benefit that the matters charged should be published. Before 1843 (6 and 7 Vict., c. 96) the truth of the libel was no defence to the indictment. The maxim prevailed, "The greater the truth the greater the libel." *

It is a defence to an action for libel or slander to prove that the circumstances under which the defamatory words were written or

* In Rome the truth of the libel was undoubtedly a defence both to criminal and civil proceedings. (See Horace's Satires, Bk. II., 1, 83, 5.)

spoken afforded an excuse for their employment. And this is so even though the words be proved or admitted to be false. The occasion is said to be privileged. The utterance is excused for the sake of common convenience and for the welfare of society. There are two kinds of privileged occasions—

1. Absolutely privileged, such as words spoken in Parliament.
2. Qualified.

The course of procedure at the trial is as follows:

The plaintiff is always entitled to begin, even where the onus of proof lies on the defendant. The plaintiff must prove, where necessary, his special character. He must next prove that the defendant published the libel or spoke the slanderous words to some third person.

The libel itself must be produced at the trial. The jury are entitled in all cases to see it. The defendant is entitled to have the whole of it read.

Whether a communication is or is not privileged is a question for the Judge alone. If there is any doubt as to the circumstances the jury finds what they were, and then, on their findings, the Judge decides whether the occasion was privileged or not. If the occasion was not privileged, and the words are defamatory and false, the Judge will direct a verdict for the plaintiff. If the occasion was absolutely privileged, judgment will be given for the defendant. If, however, the Judge decides that the occasion was one of qualified privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he gives no such evidence, it is the duty of the Judge to nonsuit him or to direct a verdict for the defendant. If he does give any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or not the defendant was actuated by malicious motives. Malice is defined as any indirect and wicked motive which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once.

In cases of slander the only way to prove publication is by calling those who heard the defendant speak the words.

Whenever the words used are not well known and perfectly intelligible English, but are foreign, local, technical, provincial or obsolete expressions, parol evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of claim by an innuendo.

If the libel does not name the plaintiff, there may be need of some evidence to shew who was meant. The plaintiff may give evidence of all surrounding circumstances, i.e., the cause, the occasion

of publication, later statements made by the defendant, and other extraneous facts which will explain and point the allusion. The plaintiff may also call at the trial his friends or others acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. It is not enough for the plaintiff to prove his special character, and that the words refer to himself: he must further prove that the words refer to himself in that special character, if they be not otherwise actionable.

The Judge must decide whether the occasion is or is not privileged and also whether such privilege is absolute or qualified.

Malice may be proved either by extrinsic evidence of personal ill-feeling or by intrinsic evidence such as the exaggerated language of the libel, the mode and extent of publication, and other matters in excess of the privilege.

If the defendant has pleaded a justification, the plaintiff's counsel may, if he chooses, rebut the justification, or he may leave such proof till the reply; but he cannot call some evidence to rebut the justification and more afterwards, thus dividing his proof.

The plaintiff need give no evidence of any actual damage where the words are actionable *per se*. He can nevertheless recover substantial damages. But if the plaintiff has suffered any special damage, this should be pleaded and proved. It cannot be proved unless it has been pleaded. Where the words are not actionable *per se*, the plaintiff cannot prove a general loss of custom; he must call individual customers and friends, and ask them why they have ceased to deal at his shop or to entertain him.

In an action for libel, where no material or actual damage is proved, the plaintiff may recover exemplary damages: *Filiatrault v. "La Patrie" Publication Co.*, Q. R. 28 S. C. 380.

DEFENCE.

The defendant's counsel often prefers not to call any witnesses, so as to have the last word with the jury. He may rely instead upon the cross-examination of the plaintiff's witnesses. These may be cross-examined not only as to the facts of the case, but also as to the credit, *i.e.*, as to matters not material to the issue, with a view of shaking their whole testimony; but the defendant must take the witness' answer—he cannot call any evidence to contradict it, except on the point of a previous conviction.

The defendant must be careful not to increase by such cross-examination the amount of damages that may be given against him.

The defendant may show that the plaintiff's trade is illegal.

The defendant may show, in mitigation of damages, that he published the libel innocently, without any knowledge of its contents.

He may also give evidence of antecedent conversation and transactions, or other circumstances well known to the bystanders, which shew that the words were not used in their ordinary signification. The defendant may urge that the occasion of publication was privileged.

The defendant may also prove the justification. Strict proof must be given that the whole charge made is true in every particular.

Where no justification is pleaded the defendant can give no evidence of the truth of his words not even in mitigation of damages.

Held, that the fact that the manager of the defendant company had, in the ordinary course of the correspondence of the company, handed to the company's stenographer to be typewritten by him a draft letter containing defamatory statements but of a privileged character, did not amount to such a publication of the letter as to take away the privilege. *Boesius v. Goblet* (1894), 1 Q. B. 842, followed: *Puterbaugh v. Gold Medal Co.*, 5 O. L. R. 680.

In an action for slander if the words used by the defendant are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used, and the plaintiff should not be non-suited on the ground that the words did not necessarily impute the commission of a crime: *Cameron v. Overend*, 15 Man. L. R. 408.

Statement of claim alleged that defendants "falsely and maliciously" made statement *x* and also alleged special damage. Demurrer to statement overruled following: *Western Counties v. Lawes Chemical*, L. R. 9 Ex. 218; *Acme Silver Co. v. Stacey Hardware Co.*, 21 O. R. 261. Slander of a firm, right of members to sue for same as individuals, and also as a firm, considered: *Bricker v. Campbell*, 21 O. R. 204. Finding by jury of "no damages." On such a finding judgment cannot be entered for defendant: *Wills v. Carman*, 14 A. R. 656; *Bush v. McCormack*, 20 O. R. 497. Poster advertising account for sale—libellous: *Green v. Minnes*, 22 O. R. 177. In an action for slander the defendant's statement was "You are a perjured villain, and I can put you behind the bars; you are a forger, and I can prove it." The judge left it to the jury to say whether the defendant was really charging the plaintiff with having committed the crimes mentioned. What he ought to have left to the jury was whether under all the circumstances the bystanders would or would not have inferred that the defendant did or did not impute the crimes to the plaintiff, according to what he actually said: *Johnston v. Ewart*, 24 O. R. at p. 120. The effect of a refusal by a witness to answer a question put to him considered. No inference adverse to the defendant should be drawn: *Nunn v. Brandon*, 24 O. R. 375. A company incorporated for the purpose of publishing a newspaper can maintain an action of libel in respect of a charge of corruption in the conduct of their

paper without alleging special damage: *Journal Printing Co. v. MacLean*, 23 A. R. 324. Facts intended to be relied on in mitigation of damages must be set out in the statement of defence, and unless this is done they cannot be given in evidence: *Beaton v. Intelligencer*, 22 A. R. 97. Notice of action. The statutes requiring notice of action cannot be invoked when the words spoken are defamatory and have been uttered with express malice: *Hanes v. Burnham*, 26 O. R. at pages 338, 339. Post office inspector not entitled to notice of action: *Hanes v. Burnham*, 23 A. R. 90. Notice of action addressed to editor: *Burwell v. London Free Press*, 27 O. R. 6. When the occasion is privileged the plaintiff's case fails unless there is evidence of malice in fact, and the burden of proof on this point is on the plaintiff. He must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating that as true which he knew to be untrue, or stating it in reckless disregard whether it was true or false: *Hanes v. Burnham*, 26 O. R. at pages 535, 536. See *Wells v. Lindup*, 15 A. R. 635; *Ross v. Bucke*, 21 O. R. at p. 702; *Taylor v. Massey*, 20 O. R. 429. In the case of *Wills v. Carman*, 14 A. R. 656, above referred to, a new trial was had, reported 17 O. R. 223. It was decided, as the defendant had pleaded "fair comment" he was entitled to show that the matters upon which he commented were true. This case was discussed and limited in *Brown v. Moyer*, 20 A. R. 509. The Court of Appeal held that under such defence evidence of the existence of a certain state of facts on which it was alleged the comment was fairly made was admissible, but not evidence of the truth of the statement. Pleading justification is not in itself evidence of malice entitling the plaintiff to have the case submitted to a jury: *Corridan v. Wilkinson*, 20 A. R. 184. It is quite another question whether when the defence of privilege has failed, it may not be looked upon as some evidence of malice in aggravation of damages: *Cases cited at end of judgment in last case*. It is proper to ask witnesses who in their opinion, is aimed at by the libel in question. It is not proper to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiff's business: *Journal Printing Co. v. MacLean*, 23 A. R. 324. An action for libel lies against a municipal corporation: *McLay v. Bruce*, 14 O. R. 398. In an action of slander for charging the plaintiff with stealing, evidence of the general bad character of the plaintiff is not admissible in evidence in mitigation of damages: *Williston v. Smith*, 3 Kerr, 443 (N.B.). In an action of slander where there is undisputed evidence that the words complained of applied to the plaintiff, it is misdirection to leave to the jury to find whether the defendant when he spoke the words intended the plaintiff without pointing out such evidence to them: *Good v. Good*, vol. 22, 439 (N.B.). Held, by the Court of Appeal, that a mercantile agency is not liable in damages for false information as to a trader given in good faith to

a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness. *Cossette v. Dun*, 18 S. C. R. 222, considered: *Robinson v. Dun*, 28 O. R. 21, 24 A. R. 287. On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication, the Judge charged the jury as to privilege and added "if the defendant made the communication *bona fide* believing it to be true and the privilege existed that I have endeavoured to explain then there would be no action against him:" Held, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue, the burden of which was upon him: *Green v. Miller*, 31 S. C. R. 177. An action of slander will not lie for words spoken to the plaintiff unless in the hearing of a third party: *Gallant v. Calder*, vol. 23, 73 (N.B.). In a libel action it was held that evidence of what took place at a meeting was admissible as proof that the plaintiff was the person intended by a resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy after the destruction of the original notes to shew exactly what did take place: *Taylor v. Massey*, 20 O. R. 429. In an action for slander the jury returned a finding of no damage, but said they could not agree as to whether their verdict should be for the plaintiff or defendant; upon which the trial Judge directed judgment to be entered for the defendant dismissing the action: Held, that the finding of no damage did not dispose of the action, but that there should have been a finding on the charge of guilt, and a new trial was directed. *Wills v. Carman*, 14 A. R. 656, considered: *Bush v. McCormack*, 20 O. R. 497. By section 11 of the Libel Act of Manitoba, 50 Vict. c. 22, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed: Held, that a general allegation of damages by loss of custom is not a claim for special damages under this section. Where special damages are sought to be recovered in an action of libel or for verbal slander, where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is inadmissible: *Ashdown v. Manitoba Free Press Co.*, 20 S. C. R. 43.

In an action for slander, what a bystander says he understood the words to mean is not the guide the law provides for the jury. The true guide is what he would on the occasion of the speaking of the words have reasonably understood them to mean. A jury should not be directed that they might draw an inference as to the sense

in which words were understood, from the conduct of a bystander, particularly where such conduct was equivocal. Although the amount of damages is, in a very large sense, in the hands of the jury, it is necessary always as a matter of law to direct their attention to the rule which the law prescribes for their guidance, and not to leave them under the belief that they need not make any inquiry as to the injury occasioned to the complainant by the slander, but were free to give whatever they thought proper. *Watt v. McCuaig*, 40 N. S. 41. 553.

A non-trading corporation having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights, and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and must be given the same remedies, in case of injury, as a trading corporation: and an action for libel brought by a company incorporated under the Benevolent Societies Act, was held to be maintainable without proof of special damage. *Chinese Empire Reform Association v. Chinese Daily Newspaper Publishing Co.* 13 B. C. R. 141.

The ordinary slang expression of calling a person a "fraud" does not mean that such a person has committed a fraud in the legal sense of the term, and to call a man "a liar and a fraud" is not slanderous. The expression is merely abusive language. *Agnew v. British Legal Life Assurance Co.*, 8 F. 422.

It is not contended nor can it be that the defendant in an action of libel can say, by way of defence to the action "I did not say of you what you claim that I did, but I did say of you something else, and that is true:" *Rassam v. Budge* (1893), 1 Q. B. 571, concluded that question: *Kelly v. Ross*, 1 O. W. N. 143.

The ordinary doctrines of agency and of master and servant are as applicable to corporations as to private persons, whether they arise in questions of contract or of torts and frauds. A corporation is therefore liable for the publication by its agent of a libel when the agent is acting in the course and within the scope of his employment. *Dicta* to the contrary effect of Lord Cranworth in *Western Bank of Scotland v. Addie*, (L. R. 1 H. L. Sc. 145. 167), and of Lord Bramwell in *Abrath v. North Eastern Railway* (55 L. J. Q. B. 457, 458; 11 App. Cas. 247, 250), disapproved: *Citizens Life Assurance Co. v. Brown*, 73 L. J. P. C. 10": (1904) A. C. 423; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497.

A master is liable for a libel written by his servant while acting within the scope of his employment, although without special instructions. So held, where the master was a voluntary association. *Ellis v. National Free Labour Association*, 7 F. 629.

A statement of a trader that goods of his manufacture are superior to those manufactured by another rival trader, although untrue and made maliciously, is not actionable as a defamatory libel, nor does such statement afford ground for an action for disparagement of goods, even if the plaintiff is damaged by it, and avers special damage. *Hubbuck v. Wilkinson, Heywood & Clark*, 68 L. J. Q. B. 34; (1899) 1 Q. B. 86; 79 L. T. 429.

Held, in an action for slander, that when, the alleged slanderous words being spoken in a foreign language, the person to whom the words are spoken repeats the words and states the meaning thereof in English, it will be assumed in the absence of evidence to the contrary, that he understood such foreign language. 2. That when the slanderous words complained of charge an offence, it is sufficient to prove the gist of the offence. 3. That counsel have authority to consent on behalf of their clients to judgment being given by one Judge on evidence taken before another Judge. *Reilander v. Bengert*, 1 Sask. L. R. 259, 7 W. L. R. 891.

Held, that under the Rule governing costs in British Columbia, as distinguished from that in force in England, the trial Judge must find good cause for depriving a successful party of his costs; and here there was not such good cause. *World Printing and Publishing Co. v. Vancouver Printing and Publishing Co.*, 13 B. C. R. 220

A writer who publishes defamatory statements of a person whom he names, but whom he intended to be fictitious and of whose existence he did not know, is liable in damages to a person bearing that name who would be understood to have been aimed at by his friends and acquaintances.

Defamatory statements were published in a newspaper of a person described as Artemus Jones. The writer intended the name to be fictitious, and did not know of the existence of a person bearing that name. The statements were published in good faith. The plaintiff bore the name of Artemus Jones, and had been in the employment of the defendants and a contributor to their publications. The facts stated in the article of Artemus Jones were not true of the plaintiff. In an action for libel, verdict and damages were given at the trial, and the Court of Appeal dismissed the defendants' appeal. The House affirmed the decision of the Court of Appeal (78 L. J. K. B. 937; (1909) 2 K. B. 444. *Ib. Hulton v. Jones*, 79 L. J. K. B. 198; (1910), A. C. 20; 101 L. T. 831; 54 S. J. 116; 26 T. L. R. 128—H. L. (E.).

Whoever by language, written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. The test whether the statement is a seditious libel is not either the truth

of the language or the innocence of the motive with which the statement is published, but is this: Is the language used calculated to promote public disorder or physical force or violence in a matter of State? *Ree v. Aldred*, 74 J. P. 55.

ACTION FOR WRONGFUL DISTRESS.

See Ont. Statutes, 1910, chapter 75, as to mode of settling disputes where goods are distrained.

Trespassing animals may be distrained for damage feasant for injuries to other animals as well as damage to the freehold: *Bowden v. Roscoe* (1894), 1 Q. B. 608.

A bailiff in order to distrain for rent climbed over a wall into the back yard of the house and entered and distrained: Held, lawful: *Long v. Clark* (1894), 1 Q. B. 119.

"A man's house is his castle." The force of this maxim is to extend the immunity to the outer door, not only to all dwelling houses, but also to all buildings whatsoever and to the outer gates of all enclosures as regards distress and execution: *American Concentrated Meat Co. v. Hendry* (1893). W. N. 82.

EXCESSIVE DISTRESS.

Founded on 52 Henry III., c. 4, (R. S. O. 1897, c. 342, s. 5), which enacts that "distress shall be reasonable and not too great, and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses."

The plaintiff must prove: 1. The tenancy of the defendant at a certain rent; 2. The rent claimed to be due; 3. The taking a distress of goods of much greater value than the rent in arrear and charges of the distress; 4. The damages.

The simple fact of making a distress accompanied by an untrue claim of more rent than is due, and selling the goods under such claim, is not actionable unless some special damage be proved, or unless it be shewn that a larger quantity of goods has been sold than was sufficient to satisfy the rent actually in arrear: *Tancred v. Leyland*, 16 Q. B. 669.

In an action for excessive distress, the plaintiff may recover, though no special damage be proved: *Black v. Coleman*, 29 U. C. C. P. 507.

The tenancy must be proved by production and proof of the lease, or by the defendant's receipts for rent or notices to quit, or other

admission by him of the tenancy or by oral evidence of the contract when there is none in writing.

These preliminary statements are, however, usually admitted by the bailiff's notice of distress or other proceedings.

The plaintiff must prove that his goods were distrained, but it is not necessary to prove that they were sold or taken away; the seizure as a distress is sufficient.

The fact of the distress may be proved by calling the bailiff or other person who made the distress, who will also prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should serve the defendant with notice to produce the warrant of distress and give secondary evidence of it, or should connect the act of the bailiff with the defendant by some other evidence.

When a landlord is about to make a distress he is not bound to calculate very nicely the value of the property seized but he must take care that some proportion is kept between that and the sum for which he is entitled to take it.

In order to establish the excess the plaintiff must be prepared with proof of the value of the goods seized. The question of excess is for the jury: *Smith v. Ashforth*, 29 L. J., Ex. 259.

After a distress for a month's rent it is not illegal to make another distress for the next month's rent, although it was due and in arrear at the time of the first distress. Under 11 Geo. II. c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M., s. 1, c. 5, is only an irregularity, and the tenant can only recover such special damage as he can show to have resulted from it. *Lucas v. Tarleton*, 3 H. & N. 116, and *Rodgers v. Parker*, 18 C. B. 112, followed: *McDonald v. Fraser*, 14 Man. L. R. 582.

DEFENCE.

Not guilty, by statute 11 George II., c. 19, ss. 19, 20, 21 R. S. O. 1897 c. 342, s. 17. The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress; but this statute does not apply to an illegal distress: *Field v. Mitchell*, 6 Esp. 71.

Where a party distrained as landlord on goods which, as a matter of fact, had by subsequent agreement between himself and the tenant become the distress, becomes his absolutely.

Held, that he might justify the taking on this latter ground: *Bell v. Irish*, 45 U. C. R. 170; *Schultz v. Reddick*, 43 U. C. R. 155.

As to exemptions from distress. Property of strangers. Section 31 of the Landlord and Tenant Act (R. S. O. 1897, sec. 170), provides generally that goods on the premises not the property of a

tenant are to be exempt from seizure. Exceptions are made in favour of execution creditors and purchasers for value other than relatives.

Exemptions from the tenant's own property are by sec. 30 of the same Act stated to be the goods and chattels exempt from seizure under execution. A list of these goods is found in section 3 of the Execution Act, Ont. Statutes, 1909, c. 47.

The common law right of distress for rent in arrear can only be exercised by the owner of the reversion, which must be vested in him at the time of the distress. *Starckley v. Allcock*, 16 Q. B. 636, and *Smith v. Torr*, 3 F. & F. 505, followed. A tenant, therefore, who makes a sublease of the property for the whole of his term without reserving to himself any right of distress cannot distrain for rent in arrear due under the sublease, as he has parted with the reversion. The payment of rent under the sublease does not operate as an estoppel so as to confer a right of distress for subsequent arrears of rent which otherwise does not exist. *Hazeldene v. Heaton Cab. & El.*, 40, followed. *O'Connor v. Peltier*, 8 W. L. R. 576, 18 Man. L. R. 91.

IRREGULAR DISTRESS.

At common law goods distrained for rent were merely a pledge, and could not be sold. 2 William and Mary, c. 5, R. S. O. 1897, c. 342, gave the landlord the power of selling the goods, subject to the provisions of that Act, which must be strictly complied with.

If there was any irregularity in making or treating the distress, the landlord was at common law liable as a trespasser *ab initio*. This rule was altered, in the case of a distress for rent due, by 11 George II., c. 19, s. 19, R. S. O. 1897 c. 342, s. 17, which enacts that a party aggrieved by an irregularity can recover satisfaction for the special damage sustained thereby.

In an action for selling goods distrained for rent without appraisement the measure of damages is the real value of the goods sold minus the rent due: *Knight v. Egerton*, 7 Ex. 407; *Schultz v. Reddick*, 43 U. C. R. 155.

An action for treble damages for pound breach or rescous of goods distrained for rent, under sec. 4 of 2 Will. & M. c. 5, is maintainable by the landlord without proof of any special damage suffered by him: *Kemp v. Christmas*, 79 L. T. 233.

DEFENCE.

By 11 George II., c. 19, s. 20, R. S. O. 1897 c. 342, s. 18, it is provided that the tenant shall not recover for any unlawful act or irregularity if tender of amends has been made by the party distraining before action brought.

ILLEGAL DISTRESS.

Where a distress is made by a stranger, or by a person who has no right to distrain, an action for trespass or conversion will lie.

Where a distress is made by a landlord (1) no rent being due, or (2) after a tender of the rent, or (3) after a formal distress, or (4) if the distress be illegal owing to the time, place, or manner of making it, or from the nature of the goods taken, the proceeding is illegal *ab initio*, and an action for trespass or conversion or of replevin, may be maintained.

Where a landlord distrains and sells where no rent is due, by 2 W. & M. Sess. 1, c. 5, s. 4, R. S. O. 1897 c. 342, s. 18 (2), the plaintiff shall recover double the value of the goods distrained: see *McCallum v. Snyder*, 6 U. C. L. J. 187; *Hope v. White*, 17 U. C. C. P. 52; *Bell v. Irish*, 45 U. C. R. 167; *McCaskill v. Rodd*, 14 O. R. 282.

An action for distraining for more rent than is due cannot be maintained without a tender of the sum which is really due: *Owen v. Taylor*, 39 U. C. R. 358.

In the case of an illegal distress, the measure of damages is usually the value of the goods seized, and no deduction can be allowed for any rent due: *Attack v. Bramicell*, 3 B. & S. 520.

Where distress and sale are made for rent when no rent is due to the person distraining, the owner of the goods is entitled under R. S. O. 1897, ch. 342, sec. 18, sub-sec. 2, to recover double the value of the goods distrained or sold, and full costs of suit.

The right to recover the double value not only exists against the landlord but extends to his officers and bailiffs engaged in the illegal proceedings: *Webb v. Box*, 19 O. L. R. 540.

DEFENCE.

The defence of not guilty by statute above referred to (11 George II., c. 19) R. S. O. 1897 c. 342, lets in evidence of everything that might lawfully be done in order to make the distress.

R. S. O. 1897, c. 170, s. 31, "An Act respecting the Law of Landlord and Tenant," contains provisions as to exemptions from distress.

Section 27 enacts that goods exempt from seizure under execution are not liable to seizure by distress.

By section 28 goods on the premises not the property of the tenant are to be exempt under certain restrictions.

Section 33 gives the tenant a right of set-off against the rent due, a debt due to him by the landlord.

By section 32 a tenant who is in default for non-payment of rent, and claims the benefit of the exemption under the Act, must give up possession of the premises.

By section 35, the common law strict demand of rent is dispensed with when the landlord is entitled to re-enter. Unless the premises are vacant, the demand must be made fifteen days at least before entry.

By section 36, when growing or standing crops, which may be seized and sold under execution, are seized for rent, the landlord need not reap, thresh, gather, or otherwise market such crop, but may advertise and sell them like other goods.

Sections 27, 28, 29, 30 and 34 apply only to tenancies created on or after the 1st of October, 1887.

The protection of goods of lodgers from distress is provided for by section 39.

The boarder or lodger may serve on the landlord, or on the person making the distress, a declaration that the immediate tenant has no property in the goods distrained, and that such goods are the property of the lodger, also setting out what amount is due for rent or board from the lodger to the immediate tenant. If the landlord, after receiving the declaration and the rent due by the lodger, proceeds with the distress against the lodger's goods, he is liable to an action for illegal distress.

The Assessment Act, Ont. Statutes 1904, c. 23, by section 103, exempts from seizure for taxes goods of third person where the owner is not in possession.

The effect of sections 2, 3, 6, 20 and 21 of the Act respecting Pounds, R. S. O., 1897, c. 272, is to give a right to impound cattle trespassing and doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damage can be obtained by the impounding, whatever may be done in an action of trespass. Cattle feeding in the owner's enclosure, or shut up in his stables, cannot be held to be running at large when they may happen to escape from such stable or enclosure into the neighbouring grounds. *Ives v. Hitchcock*, Dra. 247, commented on: *McSloy v. Smith*, 26 O. R. 508. An entry by a bailiff under a distress warrant for rent, must be through the ordinary and natural means of ingress to the place where the distress is about to be made: *Anglhart v. Rathier*, 27 U. C. C. P. 97. A tenant is not precluded from setting up his title to goods illegally distrained for alleged fraudulent removal because of a pretended sale of them by him, the effect of which was to vest the possession, but not the property, in the goods in the alleged purchaser: *Whitelock v. Cook*, 31 O. R. 463.

ACTION FOR SEDUCTION.

These actions are not cognizable by Division Courts.

By Ont. Statutes 1900, c. 41, the following provisions are made:

The father, or in case of his death, the mother, whether she remains a widow or has married again, of an unmarried female who has been seduced, and for whose seduction the father or mother could maintain an action, if such unmarried female was at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise.

When action maintainable by father or mother.

By section 3, upon the trial of an action for seduction brought by the father or mother, it shall not be necessary to prove service performed by the person seduced, but the same shall in all cases be presumed, and no proof shall be received to the contrary.

Proof of service dispensed with.

In case the father or mother of the female seduced had, before the seduction, abandoned her and refused to provide for and retain her as an inmate, then any other person who might at common law have maintained an action for the seduction, may maintain such action.

When action maintainable by master, etc.

By section 4 any person other than the father or mother who could at common law have maintained an action for an unmarried female may still maintain such action if the father or mother be not resident in Ontario at the time of the birth of the child which may be born in consequence of the seduction, or, being resident in Ontario, does not bring an action for the seduction within six months from the birth of the child.

Where father or mother not resident in Ontario.

By section 5, if the father and mother of an unmarried female who has been seduced are both dead, and such unmarried female is under the age of twenty-one, any person who, at the time of the birth of the child which is born in consequence of the seduction, was the legal guardian of, or stood *in loco parentis* to such unmarried female, may maintain an action for the seduction, notwithstanding that such unmarried female was, at the time of her seduction, serving or residing with another person upon hire or otherwise.

Who may maintain action where parents of woman are dead, besides employer.

Subject to the above Act the plaintiff must prove: 1. That the party seduced was in the plaintiff's service: 2. The seduction. The plaintiff must prove the defendant to have been the father of the child: mere proof of seduction by him will not be sufficient: *Kimball v. Smith*, 5 U. C. R. 32. **3. The subsequent loss of service.**

The plaintiff cannot give evidence of the daughter's good character, except in answer to evidence of general bad character given on the other side: *Bamfield v. Massey*, 1 Campbell, 460.

The mother suing as the mistress of the girl has a sufficient common law right to bring the action: *Gould v. Erskine*, 20 O. R. 347. It is necessary to allege and prove the relationship of father and daughter, her seduction by the defendant, that pregnancy resulted from such seduction, and that the defendant is the father of the child of which she is so pregnant, or of which she has been delivered, as the case may be: *Evans v. Watt*, 2 O. R. 166.

The connection took place while the daughter resided at service with the defendant, and there was no evidence of any possible loss of service to the father, and there was neither birth of a child nor pregnancy; there is no right of action either at common law or under the statute. Not at common law, because, apart from any other reason, no loss of service was proved; nor under the statute, because there was no pregnancy: *Harrison v. Prentice*, 16 C. L. T. 393.

Proceedings may be continued against defendant's personal representatives: *Laird v. Faircloth*, 14 P. R. 253.

DEFENCE.

The defendant may shew that he is not the father of the child.

In mitigation of damages the defendant may shew the loose character of the girl.

Vincent v. Sprague, 3 U. C. R. 283, and *Brown v. Dalby*, 7 U. C. R. 160, considered. *Gambell v. Heggie* (E. v. F.), 10 O. L. R. 489, 11 O. L. R. 582.

Evidence as to defendant's means is inadmissible: *Ferguson v. Veitch*, 45 U. C. R. 160.

In actions for seduction only if rape only be proved plaintiff must fail: *Reg. v. Doty*, 25 O. R. 362. In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to set up as an alternative the enticing away of the daughter, and the having connection with her by force and against her will, and consequent loss of service: *Cole v. Hubble*, 26 O. R. 279.

ACTION FOR MALICIOUS ARREST AND ABUSE OF CIVIL PROCESS.

In an action for malicious arrest the plaintiff must prove: 1. The affidavit for the Judge's order to arrest; 2. Its falsehood; 3. The order for the arrest; 4. The arrest under it; 5. The rescission of the order or the determina-

tion of the suit; 6. The defendant's malice and want of reasonable and probable cause; 7. The damage: *Colbert v. Hicks*, 5 A. R. 571. See *Coffey v. Seane*, 25 O. R. 22.

As to actions against magistrates and other officers, see under "Actions for False Imprisonment."

The present Ontario Act respecting arrest and imprisonment for debt is Ontario Acts 1909, c. 50.

When special damage is claimed in consequence of an unlawful imprisonment by a justice of the peace, *e.g.*, the cost of obtaining the plaintiff's discharges from prison, it should be stated in the notice of action, otherwise the plaintiff cannot give evidence of it: *Sewell v. Olive*, 2 All. 394 (N.B.). A party applying to a magistrate for a warrant to arrest another for an alleged offence is deemed only to appeal to the magistrate to exercise his jurisdiction, and is not liable in trespass for an arrest under the warrant; but if he goes beyond this and interferes in the exercise of the ministerial powers under the warrant he will be liable: *Kingston v. Wallace, et al.*, vol. 25, 573 (N.B.).

On the trial of an action for malicious arrest the Judge is not required when the evidence touching the facts upon which the question of reasonable cause depends is contradictory, to tell the jury whether or not there was reasonable or probable cause for the arrest, but directs them properly in telling them that if they find one way on the evidence there is reasonable cause, if they find otherwise there is not: *Cox v. Gunn*, 2 R. & G. 528 (N.S.). In an action for a malicious arrest upon a bailable *capias* issued out of this Court, the affidavit upon which the writ issued having been filed, may be proved by an exemplification under the seal of the Court; and proof of the defendant's signature to the original affidavit is not necessary, if it appears that the arrest was made by his procurement: *Wentworth v. Hallett*, 2 Kerr. 560 (N.B.). An action will not lie for maliciously and without probable cause detaining the plaintiff in prison after payment of the debt for which he was arrested, unless a legal determination of the suit is shewn; or the plaintiff had been ordered to be discharged by the Court: *McPhelim v. Weldon*, 5 All. 358. Any motive for a prosecution other than that of bringing a guilty party to justice is a malicious motive. Malice may be inferred from the want of probable cause; and the inference is strengthened where the defendant does not come forward as a witness to rebut it: *Burgoyne v. Moffatt*, 5 All. 13 (N.B.). If the statute has not been pleaded, honest belief is no defence if there existed no reasonable ground for such belief: *McKay v. Cummings*, 6 O. R. 400.

A corporation is liable in tort for false arrest when the charge is laid under instructions from its vice-president and local manager: *Leonard v. Ramsay*, Q. R. 30 S. C. 345.

In an action for damages for false arrest the function of the jury is only to find whether the evidence adduced establishes facts from which good faith and reasonable and probable cause or malice, and want of reasonable and probable cause can be deduced; the inferences of good or bad faith, reasonable and probable cause, or the absence thereof to be drawn from such facts is a question of law to be determined by the Court alone, and the jury ought to be guided on questions of law by the Court: *Belanger v. Larocque*, Q. R. 25 S. C. 403.

A plaintiff may sue for damages for false arrest, alleging that the information, trial and conviction were irregular, null, arbitrary, malicious, *ultra vires*; that the conviction was quashed as such upon *certiorari*; and that the plaintiff has suffered damage owing to the fault, negligence and imprudence of the defendants and their employees, such allegations being in effect sufficient charges of want of probable and reasonable cause: *Leonard v. Delorme*, 6 Q. P. R. 349.

Held, reversing the decision of the Divisional Court, 8 O. L. R. 251, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority, or any reason to think that he had officially authority to do what he did, and was therefore, although the plaintiff did not prove malice not entitled to the protection afforded by s. 1, s.s. 1 of R. S. O. 1897, c. 88, and was liable for the trespass: *Kelly v. Barton*, 26 O. R. 608, 22 A. R. 522, followed. Review of English and Ontario cases: *Moriarty v. Harris*, 10 O. L. R. 610.

In an action for damages for false arrest the onus is on the plaintiff to prove that there was not probable cause for the arrest, and that the defendant was actuated by malice. Malice alone is not sufficient, there must be absence of probable cause. The theory of probable cause, according to English law, does not prevail in Quebec; the rule of the French law must be applied: *Giguere v. Jacob*, Q. R. 10 K. B. 501.

The defendant, the chief of police for the city of Winnipeg, went to the plaintiff's house, and while there an altercation ensued and the plaintiff applied an abusive epithet to the defendant. For this the defendant arrested the plaintiff and locked him up, and on being brought before a magistrate the plaintiff was convicted, but the conviction was quashed. The plaintiff then brought this action for false imprisonment and malicious prosecution: Held, that even assuming the use of the abusive epithet to have been an offence, the defendant was not justified in arresting the plaintiff in his own house, the law constituting it an offence only when occurring on a public street, etc.: Held, also, that there was no reasonable and probable cause for the prosecution of the plaintiff: *Fitch v. Murray*, T. W. 74 M. L. R. (Man.). A person is not liable to an action for false imprison-

ment who merely lodges a complaint before a justice and leaves the proceedings to be taken in the discretion of the magistrate: *Brown v. Moore*, 2 Pug. 407 (N.B.).

In an action for a malicious arrest on a *ca. sa.* the question to be submitted is not whether the assignment of the property which caused defendant to arrest really is fraudulent or not, but whether defendant had good reason to suspect it: *Gunn v. McDonald*, 6 U. C. R. 596. Where in an action against a constable for false arrest, it was found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to receive notice of action; and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously: *Scott v. Reburn*, 25 O. R. 450.

In an action for malicious arrest and for destruction of liquor under R. S. O. 1877, c. 73: Held, following *Legacy v. Pitcher*, 10 O. R. 620, that in such an action the venue need not be laid where the offence was committed: *Bond v. Conmee*, 15 O. R. 716, 16 A. R. 390.

Where in an action for malicious arrest the facts are contradicted, the question of reasonable and probable cause must be decided exclusively by the Judge. The action at the trial was treated as one for malicious arrest, and in that view a non-suit was entered. In term it was argued that the action was really one of trespass, and that the whole case should have been left to the jury as such, but the Court held that it was too late to urge this: *Donnelly v. Bawden*, 40 U. C. R. 611.

ILLEGAL PROCEEDINGS.

Any trade union, whether registered or not, can be sued in Court by means of a representative action for illegal interference with employers or business of plaintiffs. *Dominion Coal Co., Ltd. v. Bousfield*, 8 E. L. R. 145; *The Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (1901), A. C. 426.

Workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen without threats, violence, intimidation or other illegal means, take such measure as results in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages. Judgment of the Court of Queen's Bench (Q. R. 6 Q. R. 65) affirmed: *Perrault v. Gauthier et al.*, 28 S. C. R. 241.

Maliciously inducing employer to discharge servant and not to employ servant. An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make a doer liable to a civil action: *Allan v. Flood* (1898), A. C. 1.

A workman sued an insurance company which undertook the insurance of employers against risks under the Workmen's Compensation Act. He averred that the company were in the habit of issuing to insurers lists of workmen "whom they insist shall not be employed by said parties," that they had unwarrantably placed his name on these lists, and that, in consequence thereof, he had on two occasions been dismissed from his employment, and on a third occasion had been refused employment after having been engaged.—Held, that the averments disclosed no actionable wrong: *Mogul Steamship Co. v. McGregor* (61 L. J. Q. B. 295 (1892), A. C. 25); *Allen v. Flood* (67 L. J. Q. B. 119, (1898), A. C. 1), and *Quinn v. Leatham* (70 L. J. P. C. 76, (1901), A. C. 495) commented on. *MacKenzie v. Iron Trades Employers' Insurance Association* (1910), S. C. 79—Court of Session.

Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into civil wrong for which reparation is due.

Dicta in this regard of Lord Esher (then Brett, L.J.) in *Bowen v. Hall* (50 L. J. Q. B. 305; 6 Q. B. D. 333) and in *Temperton v. Russell* (62 L. J. Q. B. 412; (1893), 1 Q. B. 715) disapproved.

Dicta of Lord Esher, M.R., and Lopes, L.J., in *Temperton v. Russell*, that it is actionable maliciously to induce a person not to enter into a contract, disapproved: *Allan v. Flood*, 67 L. J. Q. B. 119; (1898), A. C. 1; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.

An action is maintainable by an employer against persons who, to his damage, maliciously conspire to induce his servants to break their contract of service, and also for conspiring together to injure him by preventing persons from entering into contracts with him: *Allen v. Flood* (67 L. J. Q. B. 119; (1898), A. C. 1) distinguished. *Temperton v. Russell* (62 L. J. Q. B. 412; (1893), 1 Q. B. 715) followed. *Leatham v. Craig* (1899), 2 Ir. R. 667.

Whilst workmen, members of a trade union, have a right to strike and to combine for that purpose in order to improve their own position, provided the means resorted to be not in themselves unlawful, yet they have no right to induce other workmen, who are not members of the union and who desire to continue working, to leave their employment, or to endeavour to prevent the employers from getting other men to work for them and for that purpose to

watch and beset the places where the men happen to be, or to induce the employers' workmen to break their contracts, as these are actionable wrongs, and picketting and besetting are expressly made unlawful by s. 501 of the Criminal Code: *Quinn v. Leatham* (1901), A. C. 511; *Read v. Friendly Society* (1902), 2 K. B. 732; *South Wales Miners Federation v. Glamorgan Coal Co.* (1905), A. C. 239; *Lyons v. Wilkins* (1899), 1 Ch. 255, and *Charnock v. Court* (1899), 2 Ch. 35, followed: Held, also, that all the defendants who had participated in or counselled or procured the acts condemned, were each individually liable for the whole amount of the damages suffered by the several plaintiffs in consequence of those acts, but not for any damage caused by themselves quitting work: *Krug Furniture Co. v. Berlin Union*, 5 O. L. R., at p. 469, followed.

The destruction during the progress of this suit of a book kept by an officer of the Union at its headquarters, in which were recorded minutes relating to the strike and the non-production of a strike register kept and of the reports handed in from day to day by members of the Union actively engaged in picketting and officially appointed for that purpose were circumstances that justified the Court in presuming that they contained entries unfavourable or damaging to the defence and in being satisfied with less convincing evidence than might otherwise be required that the wrongful acts of certain members were the authorised acts of the Union: Taylor on Evidence, 10th ed., p. 117; *Cotter v. Osborne*, 18 Man. L. R. 471, 10 W. L. R. 354. Watching and besetting workmen will support an action for nuisance at common law, to which proof that the watching and besetting was for the purpose of peaceful persuasion would be no defence: *Lyons v. Wilkins*, 68 L. J. Ch. 146; (1899), 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339. Although it is not illegal for the officers of a trade union to prevent a sub-manufacturer from working for a manufacturer by withdrawing the sub-manufacturer's workmen from his employ, it is illegal for such officers to watch or beset the sub-manufacturer's premises for the purpose of persuading or otherwise preventing him from so working, or for any purpose except merely to obtain or communicate information: *Allen v. Flood* (67 L. J. Q. B. 119; (1898), A. C. 1), considered and applied. *Lyons v. Wilkins*, 67 L. J. Ch. 383; 78 L. T. 618; 46 W. R. 461.

In an action for enticing servant to desert: Held, that this did not in law amount to a permission to leave his service: *Hewitt v. Ontario Copper Lightning Rod Co.*, 44 U. C. R. 287. See also *Dillingham v. Wilson*, 6 O. S. 85.

It is an actionable wrong to persuade a servant to break his contract with his master, and it is no excuse that the persuader is not actuated by ill-will to the master, but acts in good faith in pursuance of the provisions of the constitution of a trade union, of

which he and the servant are members. The principles of *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905), A.C. 239, and *Read v. Friendly Society of Operative Stonemasons* (1902), 2 E. B. 732, applied: *Brauch v. Roth*, 10 O. L. R. 284.

A conspiracy to injure, if there be damage gives rise to civil liability; and an oppressive combination differs widely from an invasion of civil rights by a single person. It is a violation of right to interfere with contractual relations recognized by law if there be no justification for the interference. This principle cannot be confined to inducements to break contracts of service. If such wrongful interference with a man's liberty of action is intended to injure and in fact damages a third person, such third person has a remedy by an action: *Quinn v. Leatham*, 70 L. J. P. C. 76; (1901), A. C. 495; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708.

By their statement of claim the plaintiff alleged that the defendants combined with others to prevent them carrying on their trade, by inducing third persons not to deal with them: Held, that this did not violate any right of the plaintiffs, and therefore the statement of claim disclosed no cause of action: Held, per Bigham, J., that intention is immaterial if the acts themselves are not wrongful; per Phillimore, J., that given a combination, the motive and purpose make all the difference: *Boots v. Grundy*, 82 L. T. 769; 48 W. R. 638.

As there was evidence of damage resulting to the plaintiffs from the act of the defendants, the plaintiffs were entitled to an injunction and an enquiry as to damages. Proposition laid down by Lord Macnaghten (70 L. J. P. C. 76 at p. 83; (1901), A. C. 495, at p. 510) applied: *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, 77 L. J. Ch. 218; (1908), 1 Ch. 335; 98 L. T. 291; 24 T. L. R. 201 C. A.

The principle on which the Court acts in restraining an employee from divulging matters relating to his master's business is that there is an implied term in the contract of service not to use, to the master's detriment, information obtained in the course of his service: *Kirchner v. Cruban*, 78 L. J. Ch. 117; (1909), 1 Ch. 413; 99 L. T. 932.

In cases where interference with a contractual relation is actionable, substantial damage must be proved. Such inducement or procurement is not interference with a contractual relation within the meaning of *Quinn v. Leatham* (70 L. J. P. C. 76; (1901), A. C. 495); *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, 76 L. J. Ch. 194; 96 L. T. 218; 23 T. L. R. 189.

Where there is a cause of action independently of a wrong causing the death—such as a breach of contract—damage arising from the death of a human being may be included as an element of dam-

age, and that as the death of the plaintiff's wife was caused by a breach of warranty on the part of the defendants that the tinned salmon was fit for the purpose of food, the plaintiff was entitled to recover damages for the loss of his wife's services: *Jackson v. Watson*, 78 L. J. K. B. 578; (1909), 2 K. B. 193; 100 L. T. 799; 53 S. J. 477; 25 T. L. R. 454 C. A.

Misrepresentation which does not itself, and is merely incidental to some lawful act which does cause damage, is not actionable.

Where a trader acting *bona fide* causes injury to the trade of another by advertising or otherwise offering for sale at less than the ordinary retail price, goods of another's manufacture, and not having in stock at the time the goods so advertised, but only an expectation of acquiring them, the misrepresentation of fact implied in the advertisement—that is, that he has the goods in stock—is not such a misrepresentation, to which the damage to the other's trade can be attributed, as will support an action by the other for an injunction to restrain the issue of the advertisement and damages: *Richardson v. Silvester* (43 L. J. Q. B. 1; L. R. 9 Q. B. 34) and *Radcliffe v. Evans* (61 L. J. Q. B. 535; (1892), 2 Q. B. 524) distinguished. *Ajello v. Worsley*, 67 L. J. Ch. 172; (1898), 1 Ch. 274; 77 L. T. 783; 46 W. R. 245.

ACTION FOR MALICIOUS PROSECUTION.

The plaintiff must prove: 1. The prosecution of the plaintiff; 2. Its determination; 3. That the defendant was the prosecutor; 4. His malice and want of probable cause; 5. The damages sustained.

The fact of the prosecution, where instituted in the Superior Courts or Sessions, is usually proved by the production of the record or an examined copy. By R. S. O., 1897, c. 73, s. 23, a certified copy of a record is evidence of the record: *Hewitt v. Cane*, 26 O. R. 133. See judgment on page 147: *O'Hara v. Dougherty*, 25 O. R. 347.

The proper evidence to establish the fact that the defendant was prosecutor is: that the defendant employed a solicitor or agent to conduct the prosecution; that he gave instructions concerning it, paid the expenses, procured the attendance of witnesses, or was otherwise active in forwarding the prosecution.

In an action for malicious prosecution, it appeared that the defendant laid an information before a police magistrate charging the plaintiff with setting fire to the house of the defendant's mother. Warrants were issued, the plaintiff was arrested, and put under bail to appear on a particular day for preliminary hearing, and eleven witnesses for the prosecution were summoned for the same day. Before that day the prosecutrix obtained information leading her to

believe that the plaintiff could not have caused the fire in question. Whether anything or what passed between her and the magistrate in consequence was not shown, but the magistrate gave some instructions to the chief constable, and in the result no witnesses appeared, and the proceedings were in some way stopped, and the prosecutrix or her mother paid the fees and nothing more was heard of the case. Three months afterwards this action was commenced:—Held, that enough had been shown to justify the jury and the Court in assuming that the prosecution had determined favourably to be accused before the action was brought: *Beemer v. Beemer*, 9 O. L. R. 69.

In an action for malicious prosecution against parties by whom proceedings had been taken under the Act respecting Public Lunatic Asylums, R. S. O. 1897, ch. 317, for arrest and confinement of the plaintiff, as insane and dangerous, before a Justice, who committed him to gaol, from which he was afterwards taken to an asylum, and was discharged on the ground that he was not, and never had been, insane:—

Held, that the inquiry before the Justice was a judicial proceeding, and that it was essential to the plaintiff's success that he should allege and prove that the proceedings had terminated in his favour, which they had not done so long as the order of the Justice stood, and this although the statute did not provide for setting aside the adjudication of the Justice by way of appeal or otherwise: *Bush v. Park*, 12 O. L. R. 180.

There cannot be a record of proceedings between the King and an accused person in a criminal prosecution until at least a "true bill" has been found by the grand jury. The production by the proper officer of a certified copy of the bill of indictment, returned "no bill," is sufficient in view of the provisions of the Evidence Act, R. S. B. C. 1897 c. 71. Where the Act in respect of which the criminal proceedings were launched was done in the light of day, in open view of the defendant, and in pursuance of a statutory right, the trial Judge was right in leaving it to the jury to say whether, in the circumstances, the defendant really thought the plaintiff was a thief. Upon the question of damages, there was sufficient proof of costs incurred by defendant in defending himself upon the criminal charge when the plaintiff swore that he was indebted to his solicitor, and, producing the latter's bill of costs, said he did not dispute it: *Tanghe v. Morgan*, 11 B. C. R. 455, 3 W. L. R. 146.

It is essential that the plaintiff should give some evidence of the defendant's malice. If the plaintiff proves want of probable cause, malice may be inferred; but for this purpose the want of probable cause must be proved to the satisfaction of the jury. Want of probable cause is not conclusive evidence of malice: *Winfield v. Kean*, 1 O. R. 193.

The onus of proving the want of reasonable and probable cause, and of proving the existence of such facts as are evidence of such want, lies on the plaintiff.

"Reasonable and probable cause is for the Judge:" *Martin v. Hutchinson*, 20 O. R. 388; *Wilson v. Tennant*, 25 O. R. 339.

In an action for malicious prosecution the question of reasonable and probable cause is for the Judge. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred, but the inference from the facts found must be drawn by the Judge. Actual malice need not be proved, but may be inferred from the absence of probable cause. It is no answer to an action for malicious prosecution that the conviction against the accused (plaintiff) was quashed by reason of a proviso in the statute creating the offence excusing the act charged. The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness at the time of the trial is dead: *Peck v. Peck*, 35 N. B. Reps. 484.

If there is any conflict of evidence the jury must find as to facts. The Judge cannot withdraw the case from them because in his opinion there was reasonable and probable cause for the prosecution: *Hamilton v. Cousineau*, 19 A. R. 203.

In an action for malicious prosecution and false imprisonment, where the circumstances connected with the offence with which the plaintiff was charged in no way pointed to him as the guilty person, and the defendant interfered at the time of the arrest and failed to prosecute, want of probable cause may be inferred: *Semble*, if the verdict is general, and all the damages might have been recovered on either count, the Court will not grant a new trial, but will, if necessary, direct the verdict to be entered on the count sustained by the evidence: *Savage v. Breton*, 37 N. B. R. 240.

In an action for malicious prosecution the jury is to find the facts on which the question of reasonable and probable cause depends, but the Judge must determine whether the facts found do constitute reasonable and probable cause. The difficulty is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass. In determining that the plaintiff has failed to shew absence of reasonable and probable cause and withdrawing the case entirely from the jury, the Judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence.

Therefore, where the defendant has prosecuted the plaintiff for the theft of some lumber, and the plaintiff admitted taking the lumber, but swore that he had done so with the defendant's consent, in exchange for lumber of his own:

Held that it must be assumed that the exchange was actually made, and belief of the defendant, when laying the information, in the guilt of the plaintiff, necessarily implied his having forgotten that he had made such an exchange, and such forgetfulness not being admitted, was a question of fact for the jury, and so, too, the existence in the mind of the defendant of an honest belief in the plaintiff's guilt.

The plaintiff admitted that the defendant, before laying information, charged him orally with the theft of the lumber, and that he (the plaintiff) made in answer to the charge, no allusion to the exchange:—

Held, that these facts did not warrant an assumption by the trial Judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had passed entirely from the defendant's mind.

Semble, that sec. 112 of the Judicature Act expressly prohibits the putting of questions to the jury in actions of this kind and of the other kinds specified therein. Suggestion of an amendment of this section: *Still v. Hastings*, 13 O. L. R. 322.

An action for malicious prosecution, founded upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties. *Wilkinson v. Howel* (1830), Moo. & M. 495, at p. 496, followed: *Baxter v. Gordon Ironsides & Fares Co., Ltd.*, 13 O. L. R. 598.

Where a prosecutor has *bona fide* taken and acted upon the opinion of counsel laying all the facts before him, this is evidence to prove reasonable and probable cause: *Martin v. Hutchinson*, 21 O. R. 388.

The jury may give damages for the loss of reputation, the imprisonment (if any has taken place), and the expenses incurred by the plaintiff in making his defence. See *Beatty v. Rumble*, 21 O. R. 184; *Gordon v. Rumble*, 19 A. R. 440.

DEFENCE.

The defendant may not give evidence of the plaintiff's bad character.

A municipal as well as a trading corporation may be liable for malicious prosecution: *Wilson v. City of Winnipeg*, 4 M. L. R. 253 (Man.). Where inferences are to be drawn from the facts proved in an action for malicious prosecution the case must be left to a jury; and the question of "probable cause" should not be determined by the Judge alone: *Alward v. Sharp*, 1 Han. 286 (N.B.). In an action for malicious arrest defendant cannot succeed *in banc* in non-suiting

the plaintiff or in obtaining a new trial on the ground that no probable cause was shewn, if he took no such objection either at the trial or in moving for his rule: *Jones v. Duff*, 5 U. C. R. 143. Defendant gave abundance of evidence to shew reasonable cause. The Judge left it to the jury to say whether they believed that defendant received the information stated to have been given, and whether he thought it to be true that the plaintiff was about to leave the Province: Held, that the jury should have been told that the plaintiff had not proved a want of probable cause: *Smith v. McKay*, 10 U. C. R. 412 and 613.

An action lies for wrongfully issuing and executing a search warrant. Issuing a search warrant is not a mere ministerial but a judicial act of the justice, and the warrant in this case was illegally obtained and might have been quashed by reason of the fact that the information did not disclose facts and circumstances shewing the causes of suspicion: *Rex v. Kehr* (1906), 11 O. L. R. 517 specially referred to. *Willinsky v. Anderson*, 19 O. L. R. 437.

It should have been left to the jury as far as respects the search warrant to find whether the defendants did "lay all the facts of the case fairly before counsel and whether they acted *bona fide* upon the advice given": *Ravenga v. McIntosh*, 2 B. & C. 693. If there are facts in dispute the jury must pass upon these facts before the Court can say whether reasonable and probable cause is or is not absent. *Still v. Hastings*, 13 O. L. R. 332; *Willinsky v. Anderson*, 1 O. W. N. 13.

In an action for damages for malicious prosecution, the onus is on the plaintiff to prove, not only that he was discharged from the prosecution, but that the defendant who prosecuted him acted maliciously and without reasonable or probable cause: *Desaulniers v. Hird*, Q. R. 15 K. B. 394.

An action for malicious prosecution will lie against a limited company or corporation: *Edwards v. Midland Railway* (50 L. J. Ex. 281; 6 Q. B. D. 287) followed. *Stevens v. Midland Counties Railway* (23 L. J. Ex. 328; 10 Ex. 352) not followed. Judgment of Lord Bramwell in *Abrath v. North-Eastern Railway* (55 L. J. Q. B. 457; 11 App. Cas. 247), commented on. *Cornford v. Carlton Bank*, 68 L. J. Q. B. 196; (1899), 1 Q. B. 392; 80 L. T. 121.

An action for malicious prosecution founded upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties: *Barter v. Gordon Ironsides and Fares Co.*, 13 O. L. R. 598.

In an action for damages for malicious prosecution, the having taken counsel's opinion before prosecuting will not sustain a plea of

probable cause and absence of malice, unless it be shewn that all the facts were laid before him and unless he be heard to establish that he advised the prosecution with a full knowledge of them: *Durocher v. Bradford*, Q. R. 31 S. C. 240.

The object of the Act to protect justices of the peace and others from vexatious actions, R. S. O. 1887, c. 73, is for the protection of those fulfilling a public duty even though in the performance thereof they may act irregularly or erroneously; and notice of action in such a case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty such notice is not required: *Kelly v. Barton*, *Kelly v. Archibald*, 26 O. R. 608. Affirmed 22 A. R. 522. In an action for malicious prosecution for felony before magistrates it is not necessary to prove that defendant laid an information on oath where that is not averred in the declaration; it is enough to shew that he set the magistrates in motion. Nor is it indispensable that the party charged should have been arrested or imprisoned. In this case the plaintiff on receiving the magistrates' summons attended in obedience to it. The charge of felony made against him by defendant was dismissed, but the magistrates thought he had been guilty of misconduct in the same matter and he was requested to attend on another day, to which they adjourned for the purpose of considering that point: Held that the determination of the proceedings with regard to the charge complained of was sufficiently shewn: *Sinclair v. Haynes*, 16 U. C. R. 247. Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate, and a subsequent indictment preferred at the quarter sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment indorsed "no bill": Held, that this was not sufficient, but that record should have been regularly drawn up and an examined copy produced: *McCann v. Preneveau*, 10 O. R. 573. In an action for maliciously making a charge before a magistrate upon which plaintiff was arrested and afterwards discharged: Held, that it was necessary to produce the information or lay a foundation for secondary evidence, and that the plaintiff having done neither was properly non-suited: *Nourse v. Foster*, 21 U. C. R. 47. See *Sinclair v. Haynes*, 16 U. C. R. 247. In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action: *Wingfield v. Kean* 1 O. R. 193. The defendant was a justice of the peace and in the course of his duty as such acquired his knowledge of the circumstances on which he preferred the charge against defendant: Held, that he was

clearly not entitled as a magistrate on that ground to require that express malice should be proved against him: *Orr v. Spooner*, 19 U. C. R. 601. It is not sufficient for the plaintiff to shew the prosecution and its abandonment to go to the jury; he must also shew want of probable cause: *Lapointe v. Stennett*, 11 T. 1 & 2 Vict. Want of reasonable and probable cause must be shewn by the plaintiff. Slight evidence may be sufficient, for it is the proof of a negative, but there must be some proof; and where it was shewn only that defendant laid the information on which the plaintiff was arrested, and that the magistrates after hearing the parties dismissed the charges: Held, that a verdict was properly directed for defendant: *Barbour v. Gittings*, 26 U. C. R. 544.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the Court. The jury must be asked to find on the facts from which reasonable and probable cause may be inferred, but the inference must be drawn by the Judge. *Lister v. Perryman*, L. R. 4 H. L. 521, followed. *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, 11 App. Cas. 247, considered: *Archibald v. McLaren*, 21 S. C. R. 588.

In an action for malicious prosecution, the trial Judge did not rule on the question whether the plaintiff had proved that there had been absence of reasonable or probable cause for instituting the prosecution against him, but he left certain questions to the jury. The first was: "Did the defendants take reasonable care to inform themselves of the true facts of the case?"

Held, that the first question should not have been left to the jury; it was in effect the question which the Judge had to decide, namely, whether there was reasonable and probable cause.

Lister v. Perryman, L. R. 4 H. L. 521; *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 455; *Cox v. English, Scottish and Australian Bank* (1905), A. C. 168; *Brown v. Hawkes* (1891), 2 Q. B. 718, and *Archibald v. McLaren*, 21 S. C. R. 588, discussed. *Renton v. Gallagher*, 14 W. L. R. 60.

In an action for malicious prosecution on a charge of theft of several articles, the trial Judge held that there was no reasonable and probable cause for charging the theft of some of the articles and withdrew the case as to them from the jury, but held otherwise as to the other articles, and directed the jury that the fact that there was reasonable and probable cause to charge the theft of some of the articles bore upon the question of damages only, and the jury found a verdict for the plaintiff: Held, that there was no misdirection. *Johnstone v. Sutton*, 1 T. R. 547, considered and distinguished. *Reed v. Taylor*, 4 Taunt. 616, followed: *Wilson v. Tennant*, 25 O. R. 330. Case for preferring a charge of felony. The jury were directed to

inquire whether defendant had laid a *bona fide* statement of the material facts of the case before counsel, and whether he acted *bona fide* on the opinion obtained; and that, if so, that was reasonable and probable cause: Held, right: *Fellows v. Hutchinson*, 12 U. C. R. 633. That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence. Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must exist, and the question of malice must be left to the jury: *St. Denis v. Shoultz*, 25 A. R. 131. Held, that a suitor taking legal advice upon a question of law, and acting thereon apparently *bona fide* is not responsible; nor can an action for maliciously taking such proceeding be successfully prosecuted against him: *Crawford v. McLaren*, 9 U. C. C. P. 215. In an action for malicious prosecution the trial Judge without objection left certain questions to the jury, which they answered, but added that their verdict was for the plaintiff. The Judge disregarded the general verdict and entered judgment on the answers to the questions for the defendant: Held, that the parties must be assumed to have waived their right to a general verdict and assented to judgment on the specific findings of fact; for if they could waive trial by jury altogether there was no reason why they could not agree to the course adopted in this case. The jury therefore in finding a general verdict were doing what it was agreed they should not do and what the parties and the Court dispensed with their doing: *Gower v. Lusce*, 16 O. R. 88. Where the facts are distinct and uncontradicted, and there is no inference of fact, the question of reasonable and probable cause is one wholly of law. But where any fact or inference of fact is involved, the question must be determined by the jury under proper direction from the Judge. Opinion of counsel will not protect from an action for malicious prosecution unless the party uses reasonable care to ascertain the facts and lays them before counsel: *Wilson v. The City of Winnipeg*, 4 M. L. R. 193 (Man.). The falsity of a charge cannot give a cause of action against a magistrate who acts upon the assumption and belief of its truth; and an allegation that he acted without any just cause upon a false charge, but not charging malice means only that the charge being false he had no just cause: *Sprung v. Anderson*, 23 U. C. C. P. 152.

ACTION FOR FALSE IMPRISONMENT.

The plaintiff must prove: 1. The fact of imprisonment; 2. That it was caused by the defendant; 3. The special damage, if any.

In actions against magistrates, Judges, etc., the rule is, that if they do any act beyond the limit of their authority they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action: *Doxwell v. Impey*, 1 B. & C. 169. See *Southwick v. Hare*, 24 O. R. 528.

Even where they exceed their jurisdiction they are not liable unless they know or have the means of knowing the defect of jurisdiction.

Actions against justices of the peace cannot be brought in the County Court if the objection is taken, nor in a Division Court. See R. S. O. 1897, c. 88, s. 16.

R. S. O. 1897, c. 88, "An Act to Protect Justices of the Peace and others from Vexatious Actions," extended to sheriffs, Ont. Statutes, 1899 c. 7, provides as follows:

Section 1.—In an action for things done within the jurisdiction of a justice of the peace or a police magistrate, malice and want of probable cause must be alleged and proved.

By section 20, if at the trial of the action the plaintiff does not prove:

1. That the action was brought within six months next after the act complained of was committed;

2. That notice of action in writing was given one month before the action was commenced;

3. The cause of action stated in the notice: *Kelly v. Barton*, 26 O. R. 689; *Scott v. Roburn*, 25 O. R. 450.

4. That the cause of action arose in the county or district the county town of which is named in the statement of claim as the place of trial;

5. Where the plaintiff sues in a County, District or Division Court, that the cause of action arose within the county, district, or united counties for which such Court is holden.

Then and in such case the plaintiff shall be nonsuited, or a verdict given for the defendant.

By section 21, if the plaintiff is proved to have been actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, or that he has undergone no greater punishment than the legal punishment, he is entitled only to three cents damages and no costs of action, even if he proves his cause of action in other respects.

By section 23 costs are allowed as between solicitor and client to a successful plaintiff or defendant in this action.

By Ont. Statutes, 1909, c. 6, s. 15, every bailiff or constable, and every coroner or elisor, guilty of misconduct in execution process, is liable.

If a private person falsely and maliciously, and without any probable cause, puts the law in motion to cause the apprehension of another, it is properly the subject of an action for malicious prosecution.

A magistrate is liable in an action of damages to a person who has suffered imprisonment under a sentence pronounced by him in excess of jurisdiction, and in such an action it is not necessary to aver malice or want of probable cause: *McCreadle v. Thomson* (1907), S. C. 1176.

At the trial of an action for false imprisonment, the Judge is not bound to put to the jury specific questions, such as, "Did the defendants take reasonable care to inform themselves as to the facts?" "Did the defendants honestly believe that the plaintiff was guilty of the offence for which he was arrested?" But may, with a proper charge, submit all the facts to the jury, leaving them to return a general verdict. 2. In charging the jury, the Judge should not suggest to them that they might put themselves in the plaintiff's place, and consider how much they ought in that case to be paid. But as no objection had been raised as to the damages allowed being excessive, the verdict should not be disturbed on that ground. 3. Evidence to prove the bad character of the plaintiff in such an action, was properly rejected at the trial: *Newsman v. Carr*, 2 Stark 69; *Jones v. Stevens*, 11 Price 235; and *Downing v. Butcher*, 2 Moo. & R. 374, followed. 4. The Judge's charge to the jury that it is necessary in such an action for the plaintiff to prove malice as well as want of reasonable and probable cause, was wrong; but, although there was no evidence of malice except as it might have been inferred from the absence of reasonable and probable cause, the misdirection was not a ground for ordering a new trial, the verdict not having been attacked as excessive. 5. There is no ground for an action for malicious prosecution unless the acts complained of are the result of a complaint laid before a magistrate: *Sinclair v. Ruddell*, 16 Man. L. R. 53.

In an action for false imprisonment, where the justice who issued the warrant acted wholly without jurisdiction, proof of malice or want of probable cause is unnecessary. A complaint in writing under oath for a search warrant under which a warrant was issued, and goods named therein were found in the possession of the accused, will not justify arrest, without further or other complaint. The expense to which a party complaining may have been put by an illegal arrest is a proper element of damages: *Melanson v. Lavinge*, 37 N. B. R. 539.

DEFENCE.

The defendant may prove in justification that an offence was committed for which a person might have been arrested without a warrant, and that there is reasonable and probable cause to suspect that the plaintiff committed such an offence.

A constable having reasonable cause to suspect that such an offence has been committed is justified in arresting the party suspected, though it afterwards appear that no such offence has been committed. It is otherwise in the case of misdemeanour without a warrant, except in the case of a breach of the peace committed in his presence, or in the presence of someone else who gives the person committing into custody, there being a danger of renewal; but if there is no such danger, and the arrest is not the result of a continued pursuit, the arrest is unlawful. He is in no case justified in handcuffing a prisoner, unless it be necessary to prevent an escape, or an escape be attempted: *Wright v. Court*, 4 B. & C. 596.

By 24 Geo. II., c. 44, R. S. O. 1897, c. 326, no action shall be brought against any constable for anything done under a warrant unless after demand of sight and copy of warrant and refusal and unless commenced within six calendar months after the act committed.

In an action for false imprisonment the six months are to be reckoned exclusive of the day of the discharge of the prisoner: *Hardy v. Ryle*, 9 B. & C. 603.

By Ont. Statutes, 1910, c. 34, sec. 49 (j), an action for false imprisonment must be brought within four years after such cause of action.

By the last-mentioned statute, 21 Jac. I., c. 21, R. S. O. 1897, c. 323, any action brought against any "mayor or bailiff of city or town corporate, head borough, portreeve constable, tithing man, churchwarden or overseer of the poor" for any matter done by virtue of their office, such action must be brought in the county where the offence was committed. The defendant may plead the general issue and give his special matter in evidence.

Evidence may be given in mitigation of damages where such evidence tends to shew reasonable grounds of suspicion.

Disclosure of information: *Humphrey v. Archibald*, 20 A. R. 267.

In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding in answer to a question of a certain amount of damages is not equivalent to the general verdict which must be given them: *Gordon v. Denison*, 22 A. R. 315.

In an action for false imprisonment the defendant by notice justified under a justice's warrant. Held, that a verdict for the

plaintiff could not be sustained on the grounds that the proceedings before the justice were not *bona fide*, or that the defendant having improperly procured the warrant was estopped from setting it up as they had not been submitted to the jury: *Thompson v. Mott*, vol. 32, 350 (N.B.).

ACTION FOR ASSAULT AND BATTERY.

An assault or battery must be an act done against the will of the party assaulted.

The circumstances of time and place, when and where the assault was given, require different damages.

Initiation proceedings: *Kinver v. Phoenix*, 7 O. R. 377; handcuffing: *Gordon v. Denison*, 22 A. R. 315.

DEFENCE.

There is no assault if the plaintiff consented to the defendant's act, or if the injury is the result entirely of a superior agency and is unavoidable, and the conduct of the defendant entirely without fault.

The following are the main defences in this action.

1. That the plaintiff made the first assault, and the defendant's battery was in self-defence.
2. That the assault was committed in defence of possession.
3. Reasonable chastisement.
4. Process of law.
5. Conviction or certificate of dismissal under the provisions of Criminal Code relating to summary convictions.

ACTION FOR TRESPASS TO PERSONAL PROPERTY.

This action includes every direct forcible injury or act disturbing the possession of goods without the consent of the owner, however slight or temporary the act may be: see *Rogers v. Devitt*, 25 O. R. 84.

Any possession is sufficient as against the third person who has no title at all. Property is sufficient without possession, for the right of property draws to it the possession: *Balme v. Hutton*, 9 Bing. 471.

As to damages, the jury may consider not only the pecuniary damage sustained, but also the intention with which the act has been done, whether for insult or injury: *Sears v. Lyons*, 2 Stark. 318.

Trespassing animals may be distrained for damage feasant for injuries to other animals as well as damage to the freehold: *Bowden v. Roscoe* (1894), 1 Q. B. 608.

DEFENCE.

Not guilty by statute.

Denial of property or possession in plaintiff. Defendant may set up title in himself or a third person, by whose command he entered. In this defence the issue is upon the defendant.

Disclaimer and tender of amends.

This is allowed by 21 Jac. I., c. 16, s. 5. Where the defendant sets up a justification, it is enough to prove a justification which covers the trespass, although it does not cover mere matters of aggravation.

The defendant may set up also a license. The license may be either an express one or one implied from circumstances.

A municipal officer illegally issuing a warrant under which a delinquent ratepayer was arrested was held guilty of trespass, and on the application of the maxim *respondet superior* the municipality was held liable in damages: *McSorley v. City of St. John*, 6 S. C. R. 581. Where a person having authority by a statute abuses such authority by some positive act contravening the same, he will be liable as a trespasser *ab initio*: *Califf v. Wilson*, Ber. (145) 79 (N.B.).

ACTION FOR MESNE PROFITS.

A plaintiff can now include a claim for mesne profits with an action for recovery of land. Hence the action for mesne profits seldom arises alone. It may occur, however, and is therefore set out.

The plaintiff must prove:

1. His title.
2. His re-entry.
3. The defendant's liability by reason of possession.
4. The amount of damage.

This action is an instance of the application of the doctrine of relation.

As to damages, the jury are not confined to the mere rent or annual value of the premises, but may give such extra damage as they think fit as a compensation for plaintiff's trouble, etc.

Other special damage may be recovered if laid as deterioration of the premises by waste or mismanagement by the defendant.

As to claims for mesne profits in an action for dower, see *Ryan v. Fish*, 4 O. R. 335; *Elliott v. Elliott*, 20 O. R. 434. A well and rail fence: Held, evidence to go to a jury of improvements: *Morton v. Lewis*, 16 U. C. C. P. 485. An executrix who had an annuity charged

on the income of the estate, real and personal, expended money in good faith in improving the real estate and in other unauthorized ways, and was in consequence found largely indebted to the estate: Held, that her expenditure in improvements should be allowed so far as it had enhanced the value of the estate: *Morley v. Mathews*, 14 Chy. 551. Where a deed is set aside as fraudulent as against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property: *Scott v. Hunter*, 14 Chy. 376. See *Buchanan v. McMullen*, 25 Chy. 193. Held, that by acquiescing in the sale of land and by her laches, the widow had waived her right to compensation for the loss of benefits bequeathed to her by her husband: *Ripley v. Ripley*, 28 Chy. 610.

A mortgage of growing crops, or crops to be grown, cannot prevail over a prior execution in the hands of the sheriff against the goods of the mortgagor: *Clifford v. Logan*, 11 M. L. R. 423 (Man.).

A chattel mortgage covering growing crops, or crops to be grown, does not come within the provisions of the Bill of Sale Act, R. M. S. c. 10, so as to need filing under the Act to preserve its validity: *Clifford v. Logan*, 11 M. L. R. 423 (Man.).

The rule that a party in good faith making improvements on property which he has purchased will not be disturbed in his possession, even if the title prove bad without payment for his improvements, will be enforced actively in this Court as well where the purchaser is plaintiff as where he is defendant; and that although no action has been brought to dispossess him: *Gummerson v. Banting*, 18 Chy. 516. No occupation rent should be charged against one who has been in occupation of land under mistake of title in respect of the increased value thereof arising from improvements which are not allowed him: *McGregor v. McGregor*, 5 O. R. 617. Held, in this case where a tax sale was set aside for irregularities in sale, that the defendant was entitled under R. S. O., 1877, c. 95, s. 4, though not under R. S. O. 1877, c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses: *Haisley v. Somers*, 13 O. R. 600. See also *Edinburgh Life Insurance Co. v. Ferguson*, 32 U. C. R. 253; *Churcher v. Bates*, 42 U. C. R. 466.

ACTION FOR TRESPASS TO LAND.

In order to maintain this action the plaintiff ought to have possession, actual or constructive: *Topham v. Dent*, 6 Bing. 516; *Donovan v. Herbert*, 4 O. R. 635.

An interest in the soil, without an exclusive use of it, is sufficient to support trespass. On the other hand, exclusive possession, without property or interest in the soil, is also sufficient for this action.

It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. There are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespass committed at a period when he was not in fact in possession; thus the entry of an heir relates back to the time of the right of entry, so as to support an action against a wrongdoer for a trespass committed after the accrual of the right and before actual entry: *Barnett v. Earl of Guildford*, 11 Ex. 19.

The owner of an equitable estate must sue in the name of his trustee: *Adamson v. Adamson*, 7 A. R. 592.

To constitute a legal possession of land, not only must there be a corporeal detention, or that *quasi* detention which, according to the nature of the right, is equivalent thereto, but also the intention to act as owner of the land; no legal possession is acquired by the exercise of a supposed right as one of the public: *Adams v. Fairweather*, 13 O. L. R. 490.

The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass: *Temiscouata Ry. Co. v. Clair*, 38 S. C. R. 230.

Where a mortgagee of chattels is not to enter till default, he cannot bring trespass against the third party before such entry: *Wheeler v. Montefiore*, 2 Q. B. 133.

In an action for taking goods under a legal process wrongfully issued, the plaintiff is entitled to at least nominal damages, or to such substantial damages as the jury think adequate, although special damage is alleged but not proved: *Doss v. Doss*, 14 L. T., N. S. 646.

Isolated acts of trespass committed on wild lands from year to year will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the Judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute. To acquire such a title there must be open, visible and continuous possession known, or which might have been known to the owner, not a possession equivocal, occasional or for a special or temporary purpose. *Doe d. Des Barres v. White* (1 Kerr. N. B. 395) approved: *Sherren v. Pearson*, 14 S. C. R. 581. Where parties holding adjoining lands meet upon the land and fix a boundary between their lots by verbal agreement, such agreement will be binding upon them notwithstanding the boundary agreed upon may vary from the deeds or plans by which the parties hold: *Darison v. Kinsman*, James, 1 & 60 (N.S.); *Ross, et al. v. McKenzie*, 3 N. S. D. 69 (N.S.); *Woodberry v. Gates*, 2 Thom. 255 (N.S.). When a division line is in dispute between parties, and they agree to establish a

line and do so, and act upon it by putting up their fences and by severally occupying the land on each side, they are bound by their agreement whether the line is right or wrong, and cannot repudiate it though they have not held under it for a period of twenty years so as to gain a title by adverse possession: *Perry v. Patterson*, 2 Pug. 367 (N.B.).

The defendant, being the owner of the equity of redemption in certain lands, executed a deed on the 18th October, 1884, purporting to convey them directly to his wife for a consideration of \$100 (the receipt of which was acknowledged in the margin and in the body of the deed). The plaintiff, who claimed by conveyance from the wife, brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was, therefore, void. The plaintiff purchased *bona fide* without notice of there having been no consideration: Held, that under 49 V. c. 20, s. 10 (O.), the knowledge of the consideration in the deed authorizing the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not now dispute the consideration. That section of the Act is not to be restricted to claims upon alleged vendors' liens and the like. *Seemle*, that, even if the deed in question were to be considered voluntary and without consideration, the authorities, though not at all in unison, were sufficient to support a judgment in the plaintiff's favor, inasmuch as he had at all events a good title in equity, which was now sufficient: *Jones v. McGrath* (2), 16 O. R. 617.

By deed of conveyance of all and singular that certain parcel of land, etc., together with the houses and easements, profits, privileges, hereditaments, etc., to said parcel of land belonging to or in anywise appertaining, and all the rents, issues and profits whereof, etc., growing crops in the ground at the time of the execution of the deed will pass to the grantee: *Wood v. Lang*, 5 U C. C. P. 204.

On the trial of an action for damages for trespass to land witnesses were permitted notwithstanding the objection of the plaintiff's counsel to give evidence of what they had been told or understood, and of declarations of deceased persons in relation to lines and boundaries in dispute. Also a certified copy of a plan found in the Crown Land Office, and supposed to relate to the property in dispute was received in evidence:—Held, that the evidence was wrongly received, and that the verdict for the defendant entered upon the findings of the jury must be set aside with costs, and that the statute (Witnesses and Evidence Act, R. S. N. S. 1900, c. 160, s. 20), making admissible in evidence plans on file in the Crown Land Office was one that must be strictly construed: *Bartlett v. Nova Scotia Steel Co.*, 37 N. S. Repts. 259.

In trespass the inquiry is, what damages will compensate or restore the plaintiff financially to his ordinary position as nearly as possible at the time when the trespass was committed: *Union Bank of Canada v. Rideau Lumber Co.*, 4 O. L. R. 721.

Proper method of ascertaining the true position of the dividing line between lots pointed out: *Huffman v. Rush*, 7 O. L. R. 316; *Cook v. Tate*, 26 O. R. 403.

An administrator can bring an action in respect of a trespass against the real estate in the interval between the death of the testator and the grant of the letters of administration, and he can, if necessary, before the grant obtain the appointment of a receiver to prevent a wrong being done to the estate. The principle laid down in *Foster v. Bathes* (13 L. J. Ex. 88, 90; 12 M. & W. 226, 223) applied. *Pryse, In re*, 73 L. J. P. 84; (1904) P. 301; 90 L. T. 747.

Trespass to property; privilege of posting bills on walls: Held, that the action was not maintainable; that the agreement made with the plaintiffs amounted merely to a revocable license. *Kerrison v. Smith* (1897), 2 Q. B. 445, followed. *Wood v. Leadbitter* (1845), 13 M. & W. 538, *Lowe v. Adams* (1901), 2 Ch. 598, and *London County Council v. Dundas* (1904), P. 1, referred to and discussed: *Connor-Ruddy Co. v. Robinson-Whyte Co.*, 19 O. L. R. 133.

ACTION FOR CONVERSION OF GOODS.

This action is equivalent to the old action of trover. To maintain the action there must be an act of conversion such as must amount to a deprivation of the possession to such an extent as to be inconsistent with the right of the owner and evidence as intention to deprive him of that right.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage; and, if so, to what extent has he sustained damage: *Stimson v. Block*, 11 O. R. 96. See *Ashfield v. Edgell*, 21 O. R. 195; *Williams v. Thomas*, 25 O. R. 536.

The above remarks do not preclude the application of the following rules:

The gist of the action is the wrongful conversion of the plaintiff's goods by the defendant. A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff and a refusal by the defendant to deliver them, which is evidence of one: *Burroughes v. Payne*, 5 H. & N. 296.

An unlawful taking of goods out of the possession of the owner is itself a conversion, and not mere evidence of it. A conversion is described as where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time: *Hiort v. Bott*, L. R. 9 Ex. 89.

A person in the lawful possession of goods may be guilty of a conversion of them by dealing with them contrary to the orders of the owner: *Syeds v. Hay*, 4 T. R. 260.

In order to constitute an actual conversion it is not necessary that the party should deal with the goods as his own. It is enough if it be a dealing for a third person adversely to the true owner: *Perkins v. Smith*, 1 Wils. 328.

Misdelivery of goods by a carrier is a conversion: *Stephenson v. Hart*, 4 Bing. 476: See *Hough v. L. & N. W. R.*, L. R. 5 Ex. 51.

A wrongful sale of goods is a conversion, and no demand is necessary: *Edwards v. Hooper*, 11 M. & W. 363. A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion; but, being only presumptive evidence of a conversion, it may be rebutted by evidence to the contrary.

Refusal to be proved. A refusal must be proved; mere excuses for not delivering the goods will not be sufficient: *Severin v. Keppell*, 4 Esp. 156.

In order to render a demand and refusal evidence of conversion, it must appear that at the time of the demand made the party had it in his power to deliver up or retain the article demanded: *Smith v. Young*, 1 Camp. 441.

A servant is liable in an action of trover for conversion, though for his master's benefit: *Stephens v. Elwall*, 4 M. & S. 259.

Trover cannot in general be maintained by one joint tenant in common or parcener against the others: *Jacobs v. Seward*, L. R. 5 H. L. 464.

Damages. In actions for conversion the general rule as to damages is: the damages shall be the value of the thing converted: *Finch v. Blount*, 7 C. & P. 478.

The owner of a chattel who is wrongfully deprived of its use may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expenses consequently thereon: *The Mediana*, 69 L. J. P. 35; (1900) A. C. 113; 82 L. T. 95; 48 W. R. 398; 9 Asp. M. C. 41.

As to the evidence, the plaintiff must prove: 1. A general or special property in the goods, or, as against a wrongdoer, mere possession of them; 2. An actual or constructive possession or right of possession; 3. A wrongful conversion by the defendant; 4. The value or damages.

The damages are the value of the thing converted. See *Finch v. Blunt*, *supra*.

The evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain this action. Thus, where he has delivered the goods to a carrier or other bailee, and so parted with the actual possession, he may still maintain trover for a conversion by a stranger; for the owner retains the possession in law as against a wrongdoer, and the carrier or other bailee is only his servant: *Gordon v. Harper*, 7 T. R. 42.

With regard to the time at which the property passes at a sale of goods, where goods are sold and nothing is said as to the time of delivery or of payment, and everything the seller has to do with them is complete, the property rests in the buyer, so as to subject him to the risk of any accident which may happen to the goods: *Tarling v. Baxter*, 6 B. & C. 360.

The seller is liable to deliver them whenever demanded upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession: *Bloxam v. Sanders*, 4 B. & C. 948.

In the case of the sale of unascertained goods, until both parties have assented to the appropriation of some particular goods to satisfy the contract, the property in them does not pass: *Dirson v. Yates*, 5 B. & Ad. 313.

But where an appropriation has been made by one party, in pursuance of an authority to make the election conferred by agreement, it becomes final and irrevocably binding on both parties: *Aldridge v. Johnson*, 7 E. & B. 885.

In general, when goods are ordered to be made, so long as the order is not executed, but only in course of execution, no property passes to the person for whom they are to be made: *Mucklow v. Mangles*, 1 Taunt. 318.

In order to pass the property there must in such cases be a completion and an acceptance, or at least an approval by the buyer: *Atkinson v. Bell*, 8 B. & C. 277.

By a gift of goods the property does not pass unless the gift be by deed or instrument of gift, or be executed by an actual delivery of the thing given to the donee: *Irons v. Smallpiece*, 2 B. & A. 551.

A grant of goods not in existence, or not belonging to the grantor at the time of executing the deed of grant, was void at law until the grantor ratified the grant by some act done by him with that view after he had acquired the property therein: *Lunn v. Thornton*, 1 C. B. 379.

In equity, however, a contract which engaged to transfer to a purchaser or mortgagee property of which the vendor or mortgagor was not possessed at the time transferred the beneficial interest immediately on the property being acquired by him: *Holroyd v. Marshall*, 10 H. L. C. 191.

On this point equity now rules under the Judicature Act.

Effect of
Statute of
Frauds.

In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself, and if it appears that such title is based on a contract, the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded. It is only where the action is between the parties to the contract, which one of them seeks to enforce against the other, that the defendant must plead the Statute of Frauds if he wishes to avail himself of it. Judgment appealed from (32 N. S. Rep. 549), affirmed: *Kent v. Ellis*, 31 S. C. R. 110. Sawing up logs, of which the defendant is a tenant in common, and mixing the deals with others so that they cannot be distinguished, is evidence of conversion by one tenant in common against the other: *McKay v. Crocker*, 5 All. 20 (N.B.). Where the plaintiff has the immediate right to the possession of goods, the proper measure of damages in an action against the sheriff for wrongful taking them is the value of the goods at the time of the conversion, though they were taken under an execution against a person who had performed labour upon them, and for which the plaintiff would be bound to account to such person: *Rankin v. Mitchell*, 1 Han. 499.

Auctioneer, liability of.

An auctioneer, who at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value. *Cochrane v. Rymill*, 27 A. R. 776, 40 L. T. N. S. 744, followed. *National Bank v. Rymill*, 44 L. T. N. S. 767, and *Barber v. Furlong* (1891), 2 Ch. 172, distinguished: *Johnstone v. Henderson*, 28 O. R. 25. An auctioneer is not bound to accept all bids as a matter of course from persons present at his auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale: *Holder v. Jackson*, 11 U. C. C. P. 543. A. employed auctioneers to sell her furniture by auction at her house. She had previously given a bill

of sale to B., of which the auctioneer had no notice. The auctioneers sold the furniture and delivered it to the purchaser. B. brought trover against the auctioneers: Held, that they were liable for conversion: *Consolidated Co. v. Curtis* (1892), 1 Q. B. 495.

The possessor of land is generally entitled as against the finder of chattels found on the land. The defendant while cleaning out under the plaintiff's orders a pool of water under their land found two rings. He declined to deliver them to the plaintiff, but failed to discover the real owner. In an action of detinue: Held, that the plaintiff was entitled to the rings: *Stratford Water Co. v. Sharman* (1896), 2 Q. B. 44.

The patent to A. C. in 1796 contained the clause then usual, saving and reserving to the Crown all white pine trees: Held, that notwithstanding this reservation the plaintiff claiming under the patentee could maintain trover against defendant for the white pine, for the soil in which they grew was his and he was entitled to their shade as against a stranger: *Casselman v. Hersey*, 32 U. C. R. 333.

By a fraudulent or illegal sale or transfer of goods no property passes: *Wilkinson v. King*, 2 Camp. 335.

But when a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and the possession, although the vendee has committed a false and fraudulent representation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction: *Kingsford v. Merry*, 11 Ex. 577.

By the common law an agent entrusted with goods cannot convey to a stranger a better right than he himself possesses.

No antecedent debt due to any agent authorizes any lien or pledge in respect of that debt, nor does it authorize the agent to deviate from any express orders or authority received from his principal. Contracts are valid when made *bona fide* and without notice that the agent making them has no authority, or that he is acting *mala fide* against the owner of the goods. The owner of the goods may redeem them if they have been pledged by an agent at any time before sale upon repayment of the amount of the lien, or upon restoration of the securities in respect of which the lien exists. In case of the insolvency of the agent and the redemption of the goods by the owner, the latter becomes a creditor of the agent for the value of the goods pledged and may prove for or set off the amount paid, or the value of the goods as the case may be.

Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal, such representation cannot be called that of the principal. In such a case it is immaterial whether or not the per-

son to whom the representation was made believed the agent had authority to make it. The local manager of a bank having received a draft to be accepted, induced the drawer to accept by representing that certain goods of his own were held by the bank as security for the drafts. In an action on the draft against the acceptor: Held, that the bank was not bound by such representation; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it, which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager, with which the bank would be affected, should be confined to knowledge of what was material to the transaction, and the duty of the manager to make known to the bank: *Richards v. Bank of Nova Scotia*, 26 S. C. R. 381.

Dealings
by agents,
statute
as to.

In order to facilitate the dealing of agents entrusted with goods it has been provided, Ontario Statutes, 1910, c. 66, that an agent entrusted with the possession of goods or with documents of title thereto is deemed the owner for the following purposes, that is to say:

Mercantile
agent.

"Mercantile agent" means a mercantile agent having in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods.

Pledge.

"Pledge" includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability.

By section 16, this Act came into force on and after 1st September, 1910. The following cases must therefore be read subject to this chapter 66. The Act is as follows:

Possession

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him on his behalf.

DISPOSITIONS BY MERCANTILE AGENTS.

Powers of
mercantile
agent as to
disposition
of goods.

3.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time thereof notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of documents of title to goods, any sale, pledge or other disposition which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition acts in good faith, and has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

4. A pledge by a mercantile agent of the documents of title to goods shall be deemed to be a pledge of the goods.

5. Where a mercantile agent pledges goods as security for a debt due from or liability incurred by the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

6. The consideration necessary for the validity of a sale, pledge or other disposition of goods by a mercantile agent, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security or of other valuable consideration, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, document, security or other valuable consideration when so delivered or transferred in exchange.

7. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

8.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made in good faith to or for the use of such person, have the same lien on

Revoca-
tion of
consent.

Deriva-
tive docu-
ments.

Presump-
tion.

Effect of
pledge of
documents
of title.

Pledge for
antecedent
debt.

Rights ac-
quired by
exchange
of goods or
documents

Agree-
ments
through
clerks, etc.

Provisions
as to con-
signees
and con-
signees.

the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge or disposition by a mercantile agent.

DISPOSITION BY SELLERS AND BUYERS OF GOODS.

Disposition by seller retaining possession.

9. Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Disposition by buyer retaining possession.

10.—(1) Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Exception as to contracts under the Conditional Sales Act. Effect of sub-sale or pledge by buyer. Imp. Act 56 and 57 V., c. 71, s. 47.

(2) This section shall not apply to goods the possession of which are obtained under a contract coming within the meaning of *The Conditional Sales Act* where the seller has complied with the provisions of that Act.

11. Subject to the provisions of this Act the unpaid seller's right of lien or retention or stoppage in transitu shall not be affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto; Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods and that person transfers the document to a person who takes the same in good faith and for valuable consideration, then if such last mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu shall be defeated; and if such last mentioned transfer was by way of pledge or other disposition for value the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

SUPPLEMENTAL.

12. For the purposes of this Act the transfer of a document of title may be by endorsement, or where the document is by custom or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Mode of transferring documents.
Imp. Act 52 and 53
V. c. 45,
s. 11.

13.—(1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability for so doing.

(2) Nothing in this Act shall prevent the owner of goods from recovering them from his agent at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

Saving for rights of true owner.
Idem.
s. 12.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

14. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Saving for common law powers of agents.
Idem. s. 13

A factor has no lien on goods assigned to him until they actually come into his possession: *Clark v Great Western Railroad Co.*, 8 U. C. C. P. 191.

If stolen goods are sold, the property is divested out of the owner.

A summary mode of recovery is provided of stolen property after trial.

Where a horse was stolen from plaintiff, and bought by defendant, at public auction, but not in market overt, and the plaintiff afterwards seeing the horse took possession of it, and defendant immediately retook it: Held, that the plaintiff had a right to retake it, no property having passed to defendant by the sale; and that although it was in his possession only for a moment, yet the property reverted in him, and he could maintain trespass against defendant for the retaking: *Bowman v. Yielding*, M. T. 3 Vict.

The word "agent," referred to in R. S. O. 1897, c. 150, "An Act respecting contracts in relation to goods entrusted to agents,"

means one who is entrusted with the possession as agent in a mercantile transaction for the sale or for an object connected with the sale of the property. And an agent who has obtained possession of certain lumber from the master of a vessel, without authority from the owner, was: Held, not to have been entrusted with the possession, and that the owner was entitled to recover the value of the lumber from a *bona fide* purchaser from the agent who had paid the agent: *Moshier v. Keenan*, 31 O R. 658.

See also *Bush v. Fry*, 12 O. R. 122.

When an agent purchases goods for his principal with money supplied by the latter, there is a trust impressed upon the goods in the principal's favour, and this trust is enforceable against the agent's assignee for the benefit of creditors, even though the agent has while purchasing for the principal also purchased goods of the same kind for himself, and has not set aside specific portions of the goods to answer the principal's claim. *Harris v. Trueman*, 9 Q. B. D. 264, applied: *Long v. Carter*, 23 A. R. 121. See the next case.

If an agent is intrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing it. If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance. Affirming the previous case: *Carter v. Long*, 26 S. C. R. 430.

The property in a bank note, like that in cash, passes by delivery, and the party taking it *bona fide* and for value is entitled at common law to retain it as against the former owner from whom it has been stolen: *Miller v. Race*, 1 Burr. 452.

The same rule applies to negotiable instruments.

An instrument in the form of a promissory note given for part of the price of an article with the added condition "that the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid," is not a promissory note or negotiable instrument, and the holder thereof takes it subject to any defence available to the maker against the vendors: *Dominion Bank v. Wiggins*, 21 A. R. 275.

By statute 21 Jac. I., c. 16, s. 3, Ont. Stats., 1910, c. 34, s. 49 (g), this action must be brought within six years after the cause of action arose.

At common law the goods of an execution debtor are bound by a writ of execution from the time of tests; but by the Statute of Frauds, 29 Car. II., c. 3, s. 16, R. S. O. 1897, c. 338, p. 12, the goods

are only bound from the time of the delivery of the writ to the sheriff.

If the plaintiff wishes to claim by virtue of a special property, he must prove it.

Where the action is brought against a mere wrongdoer, it will be sufficient for the plaintiff to shew that he was in possession of the property: *Jeffries v. G. W. Ry. Co.*, 5 E. & B. 802.

The plaintiff must shew that he has a right to the immediate possession of the goods in order to recover in this action.

The reversioner or person entitled to the freehold of lands on lease may sue in this action for fixtures after severance from the demised land.

Shop fittings consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood: Held, that these articles became part of the land and passed by a conveyance of it to the defendants: *Bain v. Brand*, 1 App. Cas. 762; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Hobson v. Gorringe*, 1897, 1 Ch. 182; *Haggart v. Town of Brampton*, 28 S. C. R. 174, and *Argles v. McMath*, 26 O. R. at p. 248, followed: *Stack v. T. Eaton Co.*, 4 O. L. R. 335.

The purpose to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly fixed, but in a manner appropriate to their use, and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises, or of improving their usefulness for the purposes to which they have been applied, there should be sufficient ground in a dispute between a mortgagor and his mortgagee for concluding that both as to the degree and object of the annexation, they became parts of the realty: *Haggart v. Town of Brampton*, 28 S. C. R. 174.

The "fixtures" included in the meaning of the expression "personal chattels" by the tenth section of the Nova Scotia "Bill of Sale Act" are only such articles as are not made a permanent portion of

the land, and may be passed from hand to hand without reference to or in any way affecting the land and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act: *Warner v. Don*, 26 S. C. R. 388.

A gas engine laid on a raised bed of concrete and fastened into the ground is a fixture, and is therefore not distrainable by the landlord or tenant: *Hobson v. Gorringe* (66 L. J. Ch. 114; (1897), 1 Ch. 182); and *Reynolds v. Ashby & Son* (72 L. J. K. B. 51; (1903), 1 K. B. 87) followed. *Hellawell v. Eastwood* (20 L. J. Ex. 154; 6 Ex. 295), not followed. *Crossley v. Lee*, 77 L. J. K. B. 199; (1908), 1 K. J. 86; 97 L. T. 850.

Glass Houses—Market Garden: *Mears v. Cullender*, 70 L. J. Ch. 621; (1901), 2 Ch. 388; 84 L. T. 618; 49 W. R. 584; 65 J. P. 615.

Fixtures: *Kilpatrick v. Stone*, 13 W. L. R. 634.

Furnace cannot be moved by mortgagor: *Scottish American v. Sexton*, 26 O. R. 77.

Furnace purchased on an agreement that the property in it should remain in the vendor until paid for, ceases to be a chattel when the purchaser annexes it to the freehold. Such an agreement merely confers a license on the vendor to enter and sever from the freehold what is not longer a chattel so as to again make it a chattel. A purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor recover possession of the chattel or damages for its conversion from the purchaser: *Hobson v. Gorringe* (1897), 1 Ch. 182, and *Reynolds v. Ashby* (1904), A. C. 466, followed. *Waterous v. Henry* (1884), 2 Man. L. R. 169, and *Vulcan Iron v. Rapid City* (1894), 9 Man. L. R. 577, overruled. *Andrews v. Brown* (1909), 19 Man. L. R. 4; 11 W. L. R. 149.

The principle which, as between tenant and landlord, enables the former to remove during his term chattels which he has affixed to the soil for the benefit of his trade applies also to the case of tenant for life and remainderman, and allows the former, or his personal representatives, to remove chattels affixed to improve the estate for his own enjoyment: *Hulse, In re*; *Beattie v. Hulse*, 74 L. J. Ch. 246; (1905), 1 Ch. 406; 92 L. T. 232.

The exception of ornamental fixtures from the rule *Quicquid plantatur solo, solo cedit* applies as well between tenant for life and remainderman as between tenant and landlord: *De Falbe, In re*; *Ward v. Taylor*, 70 L. J. Ch. 286; (1901), 1 Ch. 523; 84 L. T. 273; 94 W. R. 455.

The two principles, that where an object is so attached to the house as to become part thereof it goes to the heir; and where from its nature and purpose it is clearly not intended to form part of the

realty, but is only attached thereto for the purpose of enjoyment during the occupancy of its owner, it is removable and goes to the executor—have been established from the earliest times and are still in force. These principles govern all cases of fixtures, whether between landlord and tenant for life and remainderman; and any apparent change in the law is not in the principles themselves, but arises from their application under altered conditions of life and habits: *Leigh v. Taylor*, 71 L. J. Ch. 272; (1902), A. C. 157; 86 L. T. 239; 50 W. R. 623.

A bailee who, by reason of the loss of the article deposited, is not in a position to restore it, is bound to pay the value to the bailor, but he is not responsible for the loss of profits which the latter might have derived from the article: *Gignac v. Woodburn*, Q. R. 29 S. C. 431.

Where a bailee accepts a bailment and undertakes to redeliver to his bailor, but is evicted by title paramount, he is not liable unless there is a special contract, or he is in some way to blame for the loss responsible to the bailor for injury suffered by the latter: *Ross v. Edwards*, 11 O. R. 574.

In the case of a gratuitous loan, all the increase and offspring of the loan, and everything accessional to it (in this case a pair of mares, offspring of a mare loaned, and portion of a set of harness acquired as payment for the use of oxen), belong to the lender, and must be returned at the determination of the loan, and are not subject to seizure under execution against the bailee: *Dillaree v. Doyle*, 43 U. C. R. 442.

As against their principal a country attorney, town agents have a general lien upon all documents, money, and articles coming into their hands in the course of their agency business, without regard to the purpose for which they were received: *Re A. B. & C.*, 14 C. L. J. 142. The lien upon a fund recovered extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters: *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437. Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them: *Dingwall v. McBean*, 30 S. C. R. 441.

Held, following *Porter v. Flintoft*, 6 U. C. C. P. 335, and *Ruttan v. Beamish*, 10 U. C. C. P. 90, that an action will not lie at the suit of the mortgagor of chattels against the mortgagee for seizure of the chattels before default in payment, where there is no proviso

in the mortgage for possession until default, and that even if an action would lie the jury should be told that the plaintiff could recover only to the extent of his interest in the goods, and for damage done to such interest, instead of, as in this case, for their full value as in the case of a wrong-doer: *McAuley v. Allen*, 20 U. C. C. P. 417.

In a chattel mortgage containing no redemise clause there may be an implied contract that the mortgagor shall remain in possession until default of equal efficacy with an express clause to that effect; and such an implied contract arises from the nature of the instrument unless it be very expressly excluded by its terms: *Porter v. Flintoff* (6 U. C. C. P. 335), distinguished. In a chattel mortgage of the stock-in-trade and business effects of a trader, there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment: Held, that this proviso only prohibited the sale of the goods other than in the ordinary course of business: *Dedrick v. Ashdown*, 25 S. C. R. 227. Trover is maintainable by the owner of property where a third party to whom the owner has given the use of the property has sold it without authority. The rule is that where there has been a misuser of the thing lent there is an end of the bailment, and trover is maintainable: *Sibley v. Sibley*, 2 N. S. D. 325 (N.S.).

A partner entrusted with possession of goods of his firm for the purpose of sale, may, either as partner in the business, or as a factor for the firm, pledge them for advances made to him personally; and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only: *Dingwall v. McBean*, 30 S. C. R. 441.

The purchaser of the stock of a trader where the change of ownership is open and notorious may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may be "an actual and continued change of possession" as required by R. S. O. (1877), c. 119, s. 5. *Ontario Bank v. Wilcox* (43 U. C. R. 460), distinguished: *Kinlock v. Scribner*, 14 S. C. R. 77. In an action charging a person as executor *de son tort* by meddling with the goods of the deceased, a declaration of the deceased while in possession that the goods did not belong to him is evidence for the defendant: *Powell v. Wathen*, 5 All. 258 (N.B.).

If the Court can trace money or property, however obtained from the true owner into any shape, it will secure it for the true owner by holding it to be his in equity, or by giving him a lien on it: *Merchants' Express Co. v. Morton*, 15 Chy. 274. A factor has no lien on goods consigned to him until they actually come into his

possession: *Clark v. Great Western R. W. Co.*, 8 U. C. C. P. 191. *Quare*, as to a farrier's right of lien on a horse for services rendered: *Nicolls v. Duncan*, 11 U. C. R. 332. The sheriff has no lien or claim on the goods seized for his fees: *In re Ross*, 3 P. R. 394. Lien of persons who had granted warehouse receipts for coal under a special agreement that any coal taken out by the receipt-holders should be replaced: See *Re Coleman*, 36 U. C. R. 559. There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent, than as giving a statutory lien issuing in process of execution of efficacy, equal to, but not greater, than that possessed by the ordinary writs of execution. A mechanics' lien is not analogous to the vendor's lien: *King v. Alford*, 9 O. R. 643.

An innkeeper and a livery stable keeper have a lien under R. S. O. 1897, c. 187, which, as amended in 1904 and 1907, enacts as follows:—

2. (1) Every innkeeper, boarding-house keeper and lodging-house keeper shall have a lien on the baggage and property of his guest, boarder or lodger, for the value or price of any food or accommodation furnished to such guest, boarder or lodger, and, in addition to all other remedies provided by law, shall have the right, in case the same remains unpaid for three months, to sell by public auction the baggage and property of such guest, boarder or lodger, on giving one week's notice by advertisement in a newspaper published in the municipality in which the inn, boarding-house or lodging-house is situate, or in case there is no newspaper published in the municipality, in a newspaper published nearest to such inn, boarding-house or lodging-house, of the intended sale, stating the name of the guest, boarder or lodger, the amount of his indebtedness, the time and place of sale, and the name of the auctioneer, and giving a description of the baggage or other property to be sold; and after the sale, the innkeeper, boarding-house keeper, or lodging-house keeper, may apply the proceeds of the sale in payment of the amount due to him, and the cost of such advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto, on application being made to him therefor.

Lien on baggage, etc., for accommodation, etc., furnished, and power to sell.

(1a) Every keeper of a livery stable or boarding stable shall have a lien on every horse boarded at or vehicle left in such livery stable or boarding stable, for his reasonable charges for boarding or caring for such horse or vehicle, and may enforce such lien by sale in the manner and subject to the conditions prescribed in sub-section 2 hereof.

Lien on horses and vehicles.

(2) Where an innkeeper, boarding-house keeper, lodging-house keeper or livery-stable keeper, has by law a lien upon a horse or other animal for the price or value of any food or accommodation supplied to such animal, or for care or labour bestowed thereon, he shall, in addition to all other remedies provided by law, have the

Lien on horses, etc., and power to sell.

right in case any part of such price or value remains unpaid for the space of two weeks to sell by public auction such horse or other animal on giving two weeks' notice by advertisement in a newspaper published in the municipality in which the inn, boarding-house, lodging-house or livery stable is situate, or in case there is no newspaper published in the municipality, in a newspaper published nearest to such inn, boarding-house, lodging-house or livery stable, of the intended sale, stating (if known) the name of the person or persons who brought such horse or other animal to the inn, boarding-house, lodging-house or livery stable, the amount of the indebtedness, and the name of the auctioneer, and giving a description of the horse or other animal, and after the sale, the innkeeper, boarding-house keeper, lodging-house keeper or livery stable keeper may apply the proceeds thereof in payment of the amount due to him in respect of food or accommodation supplied, or care or labour bestowed as aforesaid, and the costs of such advertisement and sale, and shall pay over the surplus, if any, to the person entitled thereto on application being made by him therefor.

Liens on
chattels.

By Ont. Stats. 1910, c. 69, s. 50, every mechanic or other person who has bestowed money or skill and materials on a chattel may sell the chattel if, after three months, payment is not made.

Defini-
tions.

The Banking Act, R. S. C., c. 29, contains the following definitions:—

Section 2, Interpretation:—

Ware-
house re-
ceipt.

(g) "Warehouse receipt"

(1) Means any receipt given by any person for any goods, wares or merchandise in his actual, visible and continued possession as bailee thereof in good faith, and not of his own property; and

(2) Includes receipts given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse, or other place for the storage of goods, wares or merchandise for goods, wares and merchandise, delivered to him as bailee and actually in the place or in one or more of the places owned or kept by him, whether such person is engaged in other business or not, and;

(3) Includes also receipts given by any person in charge of logs or timber in transit from timber limits or other lands to the place of destination of such logs or timber;

Bill of
Lading.

(h) "Bill of lading" includes all receipts for goods, wares or merchandise, accompanied by an undertaking to transport the same from the place where they were received to some other place, by any mode of carriage whatever, whether by land or water or partly by land and partly by water.

The same Act also provides as follows:—

86. The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person in the course of its banking business.

2. Any warehouse receipt or bill of lading so acquired shall vest in the bank from the date of the acquisition thereof:

(a) All the right and title to such warehouse receipt or bill of lading and to the goods covered thereby of the previous holder or owner thereof; or

(b) All the right and title to the goods, wares and merchandise mentioned therein of the person from whom the same were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise.

87. If the previous holder of such warehouse receipt or bill of lading is any person:—

(a) Entrusted with the possession of the goods, wares and merchandise mentioned therein by or by the authority of the owner thereof, or

(b) To whom such goods, wares and merchandise are by or by the authority of the owner thereof consigned; or

(c) Who by, or by the authority of the owner of such goods, wares and merchandise, is possessed of any bill of lading, receipt, order or other document covering the same such as is used in the course of business as proof of the possession or control of goods, wares and merchandise or as authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such a document to transfer or receive the goods, wares or merchandise thereby represented; the bank shall be, upon the acquisition of such warehouse receipt or bill of lading, vested with all the right and title of the owner of such goods, wares, and merchandise, subject to the right of the owner to have the same retransferred to him if the debt or liability as security for which such warehouse receipt or bill of lading is held by the bank, is paid.

2. Any person shall be deemed to be the possessor of such goods, wares and merchandise, if he is possessed of any bill of lading, receipt, order or other document as aforesaid:—

(a) Who is in actual possession thereof; or

(b) For whom or subject to whose control the same are held by any person.

90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any debt or liability incurred by it for any person in the course of its banking business.

which
the bank
may take
security.

ment of any bill, note, debt, or liability, unless such bill, note, debt or liability is negotiated or contracted:—

(a) At the time of the acquisition thereof by the bank, or

(b) Upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank;

Provido.

Provided that such bill, note, debt or liability may be renewed or the time for the payment thereof extended without affecting any such security.

2. The bank may:—

Exchang-
ing of
warehouse
receipt for
bill of lad-
ing and
vice versa.

(a) On the shipment of any goods, wares and merchandise for which it holds a warehouse receipt, or any such security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange therefor, or

(b) On the receipt of any goods, wares and merchandise for which it holds a bill of lading, or any such security as aforesaid, surrender such bill of lading or security, store the goods, wares and merchandise, and take a warehouse receipt therefor, or ship the goods, wares and merchandise, or part of them, and take another bill of lading therefor.

DEFENCE.

A lien on the goods, either general or particular, and a right to the possession of them until the claim is satisfied, is a defence.

General
lien, how
proved.

A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general usage of other persons engaged in the same employment of such notoriety as that it may be fairly presumed to have been known to the owner of the goods: *Rushforth v. Hadfield*, 6 East 626.

The doctrine of the vendor's lien for unpaid purchase-money extends to pure personal estate: *Davies v. Thomas* (69 L. J. Ch. 643, 645; (1900), 2 Ch. 462, 468), followed. *Stucley, in re; Stucley v. Kekewich*, 75 L. J. Ch. 58; (1906), 1 Ch. 67; 93 L. T. 718; 54 W. R. 256; 22 T. L. R. 33.

The vendor of goods not sold upon credit has a lien for the price. This lien is not lost so long as he keeps possession of the goods as vendor only, even though he has parted with a document transferring a title to the goods: *Imperial Land v. Docks Co.*, 5 Chy. D. 195.

In general a lien cannot arise at law unless the party claiming it has possession of the goods: *Kinloch v. Craig*, 3 T. R. 119.

There may be an equitable lien without possession: *Mackreth v. Symmons*, 15 Ves. 329.

Stoppage *in transitu* is in the nature of an equitable lien.

In general every unpaid vendor of goods has a right, on the insolvency of the vendee, to stop the goods if still on their way to the vendee. The most usual way in which the right of a vendor to stop goods *in transitu* is defeated is by assigning the bill of lading to *bona fide* assignee: *Lickbarrow v. Mason*, 2 T. R. 63.

Stoppage *in transitu* does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price: *Brasseri v. McEwen*, 10 O. R. 179.

In general, where a person bestows his labour upon a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge.

By R. S. O. 1897, c. 149, an Act respecting Conditional Sales of Chattels, as amended in 1903, 1904 and 1906 it has been enacted that every manufacturer, bailor or vendor, must in answer to an enquiry made by any proposed purchaser or other person interested within five days furnish full information respecting the balance and state of account. In case of refusal or neglect he is liable to a fine of not exceeding \$50. If there has been a breach in condition by a purchaser, and the article has been seized by the manufacturer, the latter must retain it for twenty days, and the purchaser or his successor in interest may redeem it on payment of the arrears with interest and costs and expenses of taking possession. If the goods or chattels have been sold originally for a greater sum than \$30, and have been taken possession of, they cannot be sold without five days' notice of the intended sale, first giving to the bailee or his successor any interest. This five days, and the seven days mentioned in the last paragraph, may be part of the twenty days during which the manufacturer must retain the article.

Chattels mentioned in any receipt, note, hire receipt, order or other instrument are excepted from the Act where the manufacturer, bailor or vendor, within ten days from the execution of the document evidencing the transaction, files with the clerk of the County Court in which the bailee or purchaser resides at the time of the bailment or purchase, a copy of the document evidencing the transaction. Within 20 days after the execution of the instrument a copy of the document must also be left with the bailee or conditional purchaser.

Where any goods or chattels which are subject to the provisions of said Act respecting conditional sale of chattels are affixed to any realty without the consent in writing to the owner of the goods and chattels, these goods and chattels remain subject to the Act, but the owner of the realty, or any purchaser or mortgagee has the right as against the manufacturer of the goods to retain them upon payment of the amount due and owing thereon.*

* See section 36 of Registry Act—chapter 60 Ontario Statutes. 1910—also section 68 as to discharge of instrument.

Wood-
man's lien
for wages.

In the Districts of Muskoka, Parry Sound, Nipissing, Algoma, Manitoulin, Thunder Bay and Rainy River, and in the provisional county of Haliburton, any person having performed any labour in connection with logs or timber, has by R. S. O. 1897, c. 154, a lien thereon for the amount due. This lien is a first charge, and has precedence over all other liens except any claim of the Crown or of any timber slide company. No sale or transfer of the logs or timber in any way affects the lien. A claim must be filed in the office of the clerk of the District Court of the district in which the labour has been performed. A contractor who has entered into any agreement with any licensee of the Crown to get out timber has a similar right to filing a lien.

In an action for conversion, the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration, and in fraud of creditors; the defendant justified the taking under an unregistered lien note given subsequent to the bill of sale: Held, that the verdict was properly entered for the defendant: *Poitras v. Pelletier*, 38 N. B. R. 63.

A. sends a waggon to B. to make the wood work. B., having finished the wood work sends the waggon in A.'s name for the iron work, and gets it back again from the blacksmith's. A. calls for the waggon; B. allows him to remove the box on to the highway, but on his returning for the running part, B. refuses to let it go till he is paid his bill: Held, that B. by sending the waggon to the blacksmith's had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon, and that allowing A. to remove the box into the highway, was no waiver of his lien: *Millburn v. Millburn*, 4 U. C. R. 179.

Obliteration
of
name.

The lien of an unpaid vendor of a manufactured article is not invalidated, if without his direction or connivance the purchaser paints out or obliterates the name and address of the vendor, which were pursuant to the Conditional Sales Act, 51 Vict. c. 19 (O.), properly marked on the article at the time of the conditional sale. Semble, that an instrument in the form of a promissory note, with conditions thereunder written, is an instrument evidencing a conditional sale within the first and sixth sections of that Act: *Wettlaufer v. Scott*, 20 A. R. 652.

The plaintiffs claimed a lien on a plough sold to H. upon a conditional sale agreement reserving to the plaintiffs the ownership until notes were given for the price were paid. The plough was sold by the sheriff under execution against H., the notes being unpaid, and the defendants became the purchasers. Stamped on the plough was the word "Cockshutt," but the plaintiffs' name was not otherwise in any way affixed thereto:—Held, that the stamping of the word upon the plough was not a compliance with sec. 11 of the Ordinance

respecting Hire Receipts and Conditional Sales of Goods, which requires that "the manufacturer's or vendor's name" shall be stamped thereon; and the plaintiffs could not set up the right of property or possession as against the defendants, who were *bona fide* purchasers for valuable consideration, without registering their lien notes, as provided by sec. 2, which they had not done, and therefore they had no lien on the plough: *Mason v. Lindsay*, 4 O. L. R. 365, approved. *Cockshutt Plough Co. v. Carver*, 13 W. L. R. 256.

The purchaser of a piano under a hire receipt (by which the property was to pass to him only on completion of certain payments on account) before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as is required by the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897, c. 148: Held, that the transaction was invalid as against execution creditors under s. 37 of that Act, and was not within s. 41, s.-s. 4, which is intended to except only conditional sales of chattels within R. S. O., c. 149, which this was not. Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her: *Eby v. McTavish*, 32 O. R. 187.

An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendant leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question: Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent, and must be read out as mere surplusage, and so reading the agreement the transaction was one of conditional sale, and under 57 Vict., c. 43 (O.), only the interest of the tenant in the goods could be distrained on: *Carroll v. Beard*, 27 O. R. 349.

When a verbal agreement has been made for the sale of horses or other chattels, and the purchasers afterwards sign a lien note securing payment, with the usual provisions of such a note, evidence may be given of representations or conditions of the sale or to prove a warranty, when it appears that it was not intended to include in the lien note all the terms of the agreement between the parties: *De Lasalle v. Guildford* (1901), 2 K. B. 215, and *Erskine v. Adeane*.

L. R. 8 Ch. 756, followed. 2. When the purchaser of a chattel brought with a warranty keeps it for a considerable time and makes a payment on account, the contract must be treated as executed, and a representation or condition as to the quality of the goods must then be regarded only as a warranty, for the breach of which compensation must be sought in damages and not by rescission of the contract: *McKenzie v. McMullen*, 16 Man. L. R. 11.

A brick-maker who makes bricks for another person in a brick yard belonging to that person, and has possession of the yard while engaged in making the bricks, is entitled to a lien upon them as against an execution creditor or chattel mortgagee of the owner: *Roberts v. Bank of Toronto*, 21 A. R. 629.

ACTION FOR DETENTION OF GOODS.

It is enough to show that the plaintiff is entitled to the possession of goods wrongfully held by the defendant.

It is frequently brought in England to recover the title deeds of real estate.

The damages are in general merely nominal; but the jury find the value of the articles detained, and the common law judgment is that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and costs of increase.

In determining whether or not a chattel has become a fixture the intention of the person affixing it to the soil is material only so far as it can be presumed from degree and object of the annexation: *Hobson v. Gorrings*, C. A. (1897), 1 Ch. 182.

DEFENCES.

Leave and License.

Illegality.

Statute of Limitations.

ACTION FOR THE RECOVERY OF LAND.*

The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's.

The receipt of rents and profits of land stands on the same footing as actual possession.

* Consolidated Rule 285:—A defendant in an action for the recovery of land who is in possession by himself or his tenant need not plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff; but, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and he may rely upon any ground of defence which he can prove.

The plaintiff must show that he had a right of entry at the time mentioned in the writ.

The plaintiff may, for the purpose of recovering mesne profits from an earlier day, claim the right of possession of the premises from such last-mentioned day.

By the Land Titles Act, R. S. O. (1897), c. 138, s. 100, any certificate of charge is *prima facie* evidence of the matters therein contained.

Consolidated Rules 568, 569 are as follows:

568. If upon the trial the evidence of title given by the plaintiff satisfies the Court (and the jury, if the case is tried by a jury), that he is entitled in justice to be regarded as the proprietor of the land, or is entitled to the immediate possession thereof for any term of years, but that he cannot show a perfect title by reason of some want of form in, or the defective registration of some instrument produced, or from any cause not within the power of the plaintiff to remedy by using due diligence, the Court, or the jury under the direction of the Court, may find a verdict for the plaintiff, unless the defendant or his counsel upon being required by the other party so to do give such evidence of title as shows that he is the person entitled, or that he *bona fide* claims to be the person entitled to the land by reason of the defect in the title of the plaintiff, or that he holds, or *bona fide* claims to hold, under the person so entitled.

569. Where a verdict or judgment is rendered or given under the authority of Rule 568, it shall be indorsed as rendered or given under Rules 568 and 569, and it shall be stated in the judgment to have been so given, and in any action thereafter brought for mesne profits, such judgment shall not be evidence to entitle the plaintiff to recover.

The plaintiff must formerly have proved a legal title; an equitable title is not sufficient. By the Judicature Act, the same relief is given for an equitable title as formerly the Court of Chancery would have given, and the plaintiff need only prove an equitable title. Under the provisions of the same Act, a mortgagor entitled to the possession of land may sue for the recovery thereof in his own name. In other cases, however, the person in whom the legal estate is vested must be a plaintiff in the action. It is, therefore, still material to consider where it is vested. The general rule is that in the case of passive trusts created by deed or will the use must either be reduplicated, if limited on a freehold, or must be limited on a term of years; otherwise a legal estate passes. Where the estate limited to a use is a leasehold or chattel interest, the Statute of Uses is in-

operative, and the use limited is a mere trust: *Doe v. Passingham*, 6 B. & C. 305.

With regard to grants and devises in trust, where something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as the payment of the rents and profits to another's separate use, or of the debts of a testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them and the beneficial devisee or grantee has only an equitable estate: *Jeffreson v. Morton*, 2 Wms. Saund. 11 B.

The defendant may in some cases disprove the legal title of the party through whom both he and the plaintiff claim; thus, where the plaintiff claims under a conveyance from A. B. in 1818, and the defendant under a conveyance from A. B. in 1824, the defendant may show that in 1818 A. B. had no legal estate to convey: *Oliver v. Powell*, 1 Ad. & E. 531.

But the defendant may estop himself from setting up such defence; thus an agreement to purchase by a party in possession is such an acknowledgment of title in the vendor as, in the event of the purchase not being completed, to estop the purchaser from denying the title of the vendor: *Doe d. Bord v. Burton*, 16 Q. B. 807.

Where the plaintiff is entitled with the defendant as joint tenant, tenant in common or co-parcener, he cannot maintain ejectment unless he has been actually ousted from his possession, or the defendant has done that which is equivalent to ousting: *Culley v. Taylerson*, 11 Ad. & E. 1008.

In an action by a landlord for the recovery of his land, the plaintiff in general need not prove his own title, but only the demise and its expiration, either by efflux of time, determination of will, demand of possession, notice to quit, disclaimer or forfeiture.

If there is a demise by deed or in writing, it must be proved by the production of the original lease, unless admitted. If in the defendant's possession, notice to produce should be given.

Where the lease is oral it may be proved by a person who was present at the making, or by an admission of the defendant.

A tenant at will cannot be ejected until after demand, which must be made before the date of the writ: *Gallaway v. Herbert*, 4 T. R. 620.

When a tenancy at will is created, any act inconsistent with a tenancy at will done by either party will amount to a determination of the will, and render unnecessary a formal demand of possession.

Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of yearly rent. This evidence may be rebutted, as by showing that the plaintiff received it on what was really a void lease.

Whether an instrument is a lease or an agreement for a lease depends on the intention of the parties, as may be gathered from the instrument.

Notice to produce a notice to quit is not necessary: *Doe d. Fleming v. Sommerton*, 7 Q. B. 58.

Where the lessor proceeds on a forfeiture of the lease, he must prove the demise and the forfeiture.

By R. S. O. 1897, c. 170, s. 13, an Act respecting the Law of Land-
lord and Tenant, a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in a lease shall not be enforceable until after notice, which notice must be proved. This does not apply to non-payment of rent (s.s. 7). Restrictions on forfeiture of leases.

Under same statute, sections 20 to 29, special provisions are made for the recovery of premises by landlords where a half year's rent is in arrear. Under these sections a landlord must be prepared with evidence of the right of re-entry; a service of the writ or the affixing of a copy of it, etc.; that half a year's rent was in arrear, and that no sufficient distress was found on the premises.

Where the plaintiff claimed as heir at law, he must at common law have proved that the ancestor from whom he claimed was actually seized of the land; or, if he claimed as heir to a remainderman, that his ancestor was the person in whom the remainder first vested by purchase, and also that he was heir to such ancestor. Under the Devolution of Estates Act, Ont. Stats. 1910, c. 56, all fee simple estates descend to the legal personal representatives of the deceased. By section 7, personal representatives are to be deemed in law heirs. By section 8, trust and mortgage estates devolve on personal representatives. Devolution of estates.

In ejectments by heir at law the most common defences are illegitimacy and a will. The defendant, by admitting plaintiff's pedigree and the dying seized, may, where he defends as devisee under a will, entitle himself to begin and reply: *Goodtitle d. Revett v. Braham*, 4 T. R. 497.

Where the plaintiff claims a freehold interest by a devise, he must prove:

1. The right of the testator to devise the land.
2. The regular execution of the will.
3. The death of the testator.
4. The determination of any prior estates.

The defendant may show a disclaimer by the plaintiff to take under any part of the will, or he may impeach the will by showing the want of due execution, etc., etc. See Wills Act, R. S. O. 1897, c. 128.

A devisee of a leasehold interest must prove:

1. The title of the devisor to the property, unless the defendant be estopped from disputing it.
2. The probate of the will.
3. The assent of the executor to the bequest.

In ejectment by an executor or administrator, the plaintiff must prove:

1. The leasehold title of his testator.
2. The testator's death.
3. The probate or grant of administration.

The death of the termor is proved by oral evidence, or by proof of the register of death or burial and identity of the party deceased.

The statute applying to limitation of actions relating to real property is R. S. O. 1897, c. 133. (See Part III. Defences.)

Arrears of rent and recovery of premises: *Denison v. Maitland*, 22 O. R. 166.

Where there was no evidence that land sold for arrears of taxes had been properly assessed, or that taxes duly assessed were in arrear at the time of such sale, the sale of the land is invalid: *McKay v. Cryster*, 3 S. C. R. 436. When an island which has grown out of the water formed by alluvium, has a channel dividing it from the land adjacent, navigable for canoes at low water in summer, the proprietor of the adjacent land cannot claim the island as belonging to it by accretion: *Dunphy v. Williams*, 2 Pug. 350 (N.B.). If the description of a mining claim as recorded is so erroneous as to mislead parties locating other claims in the vicinity, the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims: *Colpen v. Callahan*, 30 S. C. R. 555.

ACTION OF REPLEVIN.

The Replevin Act is Ont. Stats. 1909, c. 38. Where goods have been wrongfully distrained, the person complaining of such distress as unlawful may bring an action of replevin. Where goods have been otherwise wrongfully taken or retained, the owner, or any person capable of maintaining an action for damages therefor, may bring an action of replevin for the recovery of the goods. Will not lie against a poundkeeper: *Ibbotson v. Henry*, 8 O. R. 675.

The right to begin at the trial in replevin is the same as in other actions, although both parties are actors: *Curtis v. Wheeler*, M. & M. 493.

Statute 11 Geo. II., c. 19, R. S. O. 1897, c. 342, makes special provisions with regard to distress for rent. It does not apply to distress for damage feasant.

To an avowry for rent the plaintiff might plead a tender of the rent; to an avowry for damage feasant tender of amends.

County Court action against Township Tax Collector: *Howard v. Hevington*, 20 A. R. 175.

Replevin for a horse. Plea that the horse was the horse of defendant, and not of the plaintiff as alleged, and issue thereon: Held, that the plaintiff was entitled to begin: *Neville v. Fox*, 28 U.C.R. 231.

Where the defendant in replevin justifies the taking as a distress for rent, the alleged tenancy must be clearly proved precisely as laid in his avowry: *Ladds v. Elliott et al.*, 1 Old. 703 (N.S.).

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin: *Carter v. Long & Bisby*, 26 S. C. R. 430.

ACTION FOR ACCOUNT.

An action for an account in equity is an action for the balance found due on taking the account; it is not a series of actions for the various items included in the account, nor a series of actions for damages for breaches of covenants to make particular payments: *Manners v. Pearson*, 67 L. J. Ch. 304; (1898) 1 Ch. 581; L. T. 432; 46 W. R. 498.

DEFENCE.

Laches cannot be imputed until after knowledge of the facts: *Laches of Rice v. George*, 24 Chy. 513. Executors with a discretionary power ^{executors} to sell their testator's real estate: Held, not liable under the circumstances for loss arising from deferring sale. But where they keep the proceeds of a sale in their hands without paying it into Court pending the suit they were charged with interest: *McMillan v. McMillan*, 21 Gr. 369. Laches cannot be imputed to the Crown, and Crown, except where a liability has been created by statute it is not answerable for the negligence of its officers employed in the public service: *Burroughs v. The Queen*, 2 Ex. C. R. 293. Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing ^{Creditor} payment thereof, and if through his default or laches the money secured thereby is lost, it will be charged against the creditor and deducted from his demand: *Synod v. DeBlaquiere*, 27 Chy. 536: *Williams v. Leonard & Sons*, 26 S. C. R. 406.

TITLE III.

ACTIONS ON SPECIALTIES.

ACTION ON COVENANT.

A covenant is an agreement expressed in an instrument in writing executed as a deed. Such agreements, after proof of the deed in which they are contained, are subject to the rules of construction applicable to ordinary documents. There need be no formal words of covenant. Any words in a deed shewing an agreement to do a thing make a covenant.

A man cannot contract with himself. The objection to such a contract is an objection of substance, not of form, and it makes no difference that he joins another with himself in the covenant either as covenantor or covenantee if the obligation or the right to enforce the obligation is joint. There is no obligation, not an obligation which could not be enforced at law for defect of parties. Further, such a covenant does not, in itself, raise an obligation which will be enforced in equity. An action on one of the several obligations where the covenant is joint and several raises a different question: *Rose v. Poulton*, 1 L. J. K. B. 5, 2 B. & Ad. 822, considered and distinguished. *Ellis v. Kerr*, 54 S. J. 307.

An action of covenant cannot be maintained by grantor on a deed purporting to contain a covenant by grantee, but not executed by grantee to pay certain mortgages although she accepted the benefit of the deed: *Cred. Fonc. v. Lawrie*, 27 O. R. 498. See page 251, where *Tweedle v. Atkinson*, 1 B. & S. 393, is distinguished. See *Faulkner v. Faulkner*, 23 O. R. 252. One joint covenantee can by virtue of R. S. O., c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff: *Scarlett v. Natrass*, 23 A. R. 297. Dependent and independent covenants: *Wilson v. Fleming*, 24 O. R. 388. A voluntary deed will not be reformed against the grantor: *Bellamy v. Badgerow*, 24 O. R. 278. Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favor of either party: *Barthel v. Scotten*, 24 S. C. R. 367. The liability of joint covenanters for breach of one confined to past liability: *Elliott v. Stanley*, 7 O. R. 350.

Where different clauses in an agreement contain independent and collateral covenants, and a breach of a covenant occurs, the party

aggrieved is entitled to bring his action without reference to anything contained in any separate covenant, unless that covenant is made a condition precedent by express terms: *Scott v. Avery*, 5 H. L. C. 847, followed. *Swift v. David*, 13 W. L. R. 368.

In the province of Ontario (though not in England) the heir is only liable on descent of lands for the debts of his ancestor. He is not liable for unliquidated damages as for instance upon the ancestor's covenant for good title: *Vankoughnet v. Ross*, 7 U. C. R. 248. The obligation of a purchaser of mortgaged lands to indemnify his grantor against a personal covenant for payment may be assigned, and even before the institution of an action for the recovery of the mortgage debt; and if assigned to a person entitled to recover the debt it gives the assignee a direct right of action against the person liable to pay the same: *Maloney v. Campbell*, 28 S. C. R. 228.

Semble, the rule stated in Rawle on Covenants, 4th ed., p. 536, that when two persons jointly covenant with one another, a joint action lies for the covenantee on a breach of covenant by one of the covenanters only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements in the absence of language imputing such suretyship in regard to future acts or breaches: *Elliott v. Stanley*, 7 O. R. 350. A covenant against incumbrances in a deed purporting to convey the legal fee simple runs with the land, although the grantor was in fact seised only of an equity of redemption: *Empire Gold Mining Co. v. Jones*, 19 U. C. C. P. 245. In the covenant for good title it is only the assignee of the fee who can represent the covenantee; the devisee of a life estate cannot sue on the covenant: *Clark v. Robertson*, 8 U. C. R. 370. An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee may sue upon the covenant and recover damages in proportion to his interest: *Keys v. O'Brien*, 20 U. C. R. 12. An action on covenants running with the land can only be maintained by the party between whom and the covenantor there is privity of estate at the time of the breach: *Rowe v. Street*, 8 U. C. C. P. 217.

A bargain against particular user of land retained on sale or lease of part of an estate may be enforced by any person entitled in equity to the benefit of the bargain against any person bound in equity by the notice of it, either express or to be imputed at the time of acquisition of his own title. This right does not depend upon the existence of a covenant running with the land or of any right to relief under the common law: *Holloway v. Hill*, 71 L. J. Ch. 818; (1902) 2 Ch. 612; 87 L. T. 201.

To enable a purchaser or his successor in title to enforce restrictive covenants entered into by another purchaser against him or his

successor on the principles of *Renals v. Cowlishaw* (48 L. J. Ch. 33, 830; 9 Ch. D. 125; 11 Ch. 886) and *Spicer v. Martin* (58 L. J. Ch. 309; 14 App. Cas. 12) what must be proved. *Elliston v. Reacher*, 77 L. J. Ch. 617; (1908) 2 Ch. 374; 99 L. T. 346. Affirmed, (1908) 2 Ch. 665—C. A.

A "squatter" who gains a possessory title to land by virtue of twelve years' uncontested adverse occupation, is not relieved from the burden of restrictive covenants affecting the land merely by lack of notice of the existence of such covenants during the period of his adverse occupation. Restrictive covenants constitute an equitable interest in the land subsequently created, including the equity of a subsequent purchaser for value: *Nesbit v. Potts's Contract, In re*, 74 L. J. Ch. 310; (1905) 1 Ch. 391; 92 L. T. 448; 53 W. R. 297; 21 T. L. R. 261.

Earth filling not included under covenant to pay "for buildings and erections:" *Adamson v. Rogers*, 22 A. R. 415. Affirmed in S. C. 16, C. L. T. 242.

A covenant must be express and distinct and not gathered as arising consequently or morally by reason of something else in the deed: *Liddell v. Munro*, 4 U. C. R. 474. To determine whether covenants or agreements are dependent or independent they are to be construed according to the intent and meaning of the parties, to be collected from the instrument, and to the circumstances legally admissible in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract: *Re Canadian Niagara Power Co.*, 30 O. R. 185. Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt, and a mere promise to pay such money in consideration of forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be: *Jackson v. Yeomans*, 28 U. C. R. 307; 39 U. C. R. 280. It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England: *Casselman v. Casselman*, 9 O. R. 442. "Usual covenants" in a conveyance to a purchaser extend only to the acts of the vendor, if himself a purchaser for value; if he take by descent to the acts of himself and his ancestors; and if by devise to the acts of himself and his devisor: *Gamble v. McKay*, 7 U. C. C. P. 319. A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt: *Scarlett v. Nattress*, 23 A. R. 297. An un-

qualified covenant in a separation deed for payment of an annuity to the wife for her life is not avoided by the subsequent renunciation of the parties, or by the wife's leaving the husband without cause: *Walker v. Walker*, 19 Chy. 37.

A lease with *habendum* for a year contained a subsequent clause that either party might terminate the lease at the end of the year on giving three months' written notice prior thereto: Held, that the clause was repugnant to the *habendum* and must be rejected, and that the lease terminated at the end of the year without any notice: *Weller v. Carnew*, 29 O. R. 400.

An action of covenant cannot be maintained on a deed conveying land executed by the grantor and purporting to contain a covenant by the grantee to pay certain mortgages existing upon the premises, but which has not been executed by the grantee although she has accepted the benefit of the deed: *Credit Foncier Franco-Canadian v. Lawrie*, 27 O. R. 498.

Where two deeds dealing with the same matter are so differently framed as to be really inconsistent, the Court will infer that it was intended by all parties that the later should be substituted for the earlier: *National Bank of Australasia v. Falkingham*, 71 L. J. P. C. 105; (1902) A. C. 585; 87 L. T. 90.

Where two conditions are imposed in an agreement in a conjunctive manner, the fulfilment of the conditions is indivisible. 2. When it is certain that one of the two conjunctive conditions cannot be fulfilled within the time fixed by the agreement, the condition is then considered to have failed: *Chartrand v. Dessouard*, 6 Q. P. R. 131.

One joint covenantee can by virtue of the Mercantile Amendment Act, R. S. O. 1887, c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff: *Scarlett v. Nattress*, 23 A. R. 297.

Where the effect of a contract is to give a stranger to it a beneficial right thereunder, he may enforce such right by action. And where in an agreement for the exchange of certain lands between the sons of the defendant and a third party, which was carried out, and in which the defendant released her dower, and also conveyed lands of her own to the third party for the benefit of her sons, in consideration whereof they jointly with her covenanted with such third party to pay her an annuity to be secured by mortgage, it was:—Held, that although not named as a covenantee, she was entitled to maintain an action to enforce such covenant, and that a judgment creditor of hers was entitled to have equitable execution against her, and a receiver appointed to receive payment of the annuity: *Moot v. Gibson*, 21 O. R. 248.

The right of re-entry under the short form of lease applies to the breach of a negative as well as an affirmative covenant, so that there

is a right of re-entry for breach of the covenant not to assign or sublet without leave. *Toronto General Hospital Trustees v. Denham*, 31 U. C. C. P. 203, followed. The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant so that the fact of the document shewing the transfer not having been executed until after action brought is immaterial: *McMahon v. Coyle*, 5 O. L. R. 618.

An indenture of lease bearing date the 29th June, 1891, expressed to be made in pursuance of the Act then in force respecting Short Forms of Leases (R. S. O. 1887, c. 106), contained a covenant by the lessees that they would "leave the premises in good repair, *ordinary wear and tear only excepted*," the words in italics not being in the statutory form, and the extended statutory equivalent of the short form having in it the exception "reasonable wear and tear and damages by fire only excepted:"—Held, that the added words were not an exception to or qualification of the short form within the meaning of the Act; that the covenant had to be construed as it stood without the aid of the extended form; and therefore that the exception as to damage by fire did not apply: *Delamatter v. Brown Brothers Co.*, 9 O. L. R. 351.

Defendant claimed under a deed in fee in which, after the *habendum*, was contained a proviso that the conveyance should be void and the estate revert to the grantor, if the grantee should make default in performing the covenant thereafter contained. This covenant was that the grantee should cultivate the land during the life of the grantor for his benefit: Held, that the proviso was void as being inconsistent with the grant: *Brown v. Stuart*, 12 U. C. R. 510.

The covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability: *Duek v. Mayen*, C. A. (1892), 2 Q. B. 511.

Where damages have been assessed on a judgment on an action of tort, as to part against tort-feasors, and as to the balance against one of them, no amount actually recovered against the latter goes on relief of the liability of his co-defendant, unless and until, and then only to the extent to which that amount exceeds such balance: *The Morgengry*, 69 L. J. P. 3; (1900) P. 1; 81 L. T. 417; 48 W. R. 121; 8 Asp. M. C. 591.

ACTIONS ON COVENANTS RELATING TO LAND.

As land is for the most part conveyed and leased by instruments under seal, certain covenants usually inserted in these instruments are frequently the subject of an action.

The covenants relating to land are principally:

Not to assign or sublet without leave.

As to trade on premises.

For good husbandry.

To insure.

To repair.

To pay rates and taxes.

For title.

To yield up possession of premises at end of term.

Covenants implied in mortgages of real estate are to be found in Ont. Statutes, 1910, chapter 51, section 6. They are (1) For payment. (2) For good title. (3) Right to convey. (4) For quiet possession on default. (5) For further assurance. (6) No act to incumber. On mortgage of leaseholds: (1) Validity of lease. (2) Payment of rent and performance of covenants. Section 7 provides for cases where more persons than one join as mortgagors. In that case the covenants are joint and several. Covenants to be implied on a conveyance of land are set forth in R. S. O. 1897, c. 111, s. 17. Implied covenants in mortgages.
In conveyances.

Besides the actions on these special covenants it is well to notice:

1. Some of the most material issues arising in actions on deeds and bonds generally.

2. Some of the most material issues arising in actions on leases or other conveyances of real property.

The actions on particular covenants will be considered after the above cases 1 and 2.

1. SOME OF THE MOST MATERIAL ISSUES ARISING IN ACTIONS ON DEEDS AND BONDS GENERALLY.

Under the Consolidated Rules of Court, the defendant may deny the making of the contract in fact. This defence now in part takes the place of the old plea of *non est factum*. The plaintiff under this defence need only produce and prove the execution of the deed. Where the action is not for any liquidated sum it is also necessary to prove the amount of damage. Under special defences the defendant may shew that the deed was executed as an escrow, and was to take effect as a deed only upon some event which has not happened; or that the deed, after being sealed, was tendered to the covenantee, and he expressly rejected it; or, in the case of a corporation deed, irregularity or want of due authority in the execution of the deed.

Other special defences are: Alteration of deed; Fraud; Statute of Limitations. The Statutes of Limitation applying to deeds or specialties are now Ont. Stats. 1910, c. 54. The effect of these statutes is that no more than six years' arrears of rent or interest in respect

of any sum charged on or payable out of any land or rent shall be recovered by way of distress, action, or suit other than and except an action of covenant or debt on a specialty, in which case the limit is twenty years.

In an action on the covenant in a mortgage deed to pay the mortgage debt the limit is ten years.

It must be shewn which of the three sorts of acknowledgments, viz., writing, payment or satisfaction in part, is relied on: *Forsyth v Bristowe*, 8 Ex. 347.

2. SOME OF THE MOST MATERIAL ISSUES ARISING IN ACTIONS ON LEASES OR OTHER CONVEYANCES OF REAL PROPERTY.

This will be considered:—

(a) Where plaintiff sues as assignee of reversion, with the defences of:—

Assignment over of reversion by plaintiff.

Assignment over of term by defendant.

Surrender.

Eviction.

(b) Where defendant is sued as assignee of the lease.

(c) Action for rent under indenture of demise, with the defences of:—

Payment.

Plea of readiness to pay on the land.

Statute of Limitations.

(a) WHERE PLAINTIFF SUES AS ASSIGNEE OF REVERSION.

The assignee of a reversion cannot recover rent accrued due before the assignment: see *Wittrock v. Hallinan*, 13 U. C. R. 135.

A covenant running with the reversion, entered into by a lessor with his lessee, remains binding on the lessor, notwithstanding that he has assigned the reversion. *Dictum* in *Eccles v. Mills* (67 L. J. P. C. 25, 31, 32; (1898), A. C. 360, 371) approved and followed. *Stuart v. Joy & Nantes*, 73 L. J. K. B. 97; (1904), 1 K. B. 362; 90 L. T. 78; 20 T. L. R. 109.

Where a lessor covenants that the lessee shall peaceably enjoy the demised premises without any interruption by the lessor or any person claiming under him, the effect of the covenant is that the lessor agrees to be bound by any act of interruption by himself or by any person whom he has expressly or impliedly authorized to do the act, but he is not responsible for wrongful or negligent acts which he has not authorized: *Sanderson v. Berwick-upon-Tweed Corporation* (53 L. J. Q. B. 559; 13 Q. B. D. 547) followed. *Williams*

v. Gabriel, 75 L. J. K. B. 155; 94 L. T. 17; 54 W. R. 379; 22 T. L. R. 217.

A sub-lease for a period co-extensive with, or longer than, the sub-lessor's term operates as an assignment, and the sub-lessor cannot distrain for rent in arrears: *Parmenter v. Webber* (8 Taunt 593; 2 Moore 656), and *Preece v. Corrie* (6 L. J. (o.s.) C. P. 205; 5 Bing 24), followed. *Lewis v. Baker* (No. 1) 74 L. J. Ch. 39; (1905), 1 Ch. 46; 91 L. T. 744; 21 T. L. R. 17.

The assignee of the reversion cannot sue for breaches of covenant which accrued before the assignment to him: *Martyn v. Williams*, 1 H. & N. 817. See *Baldwin v. Wanzer*, 22 O. R. 612. Reversion severed.

Although R. S. O. 1897, c. 128, s. 10, enacts that a right of entry for condition broken shall pass by will, yet this does not extend to an action upon a covenant broken in a testator's lifetime.

Where plaintiff at time of lease has no title, but afterwards acquires one, the lease and reversion take effect in interest, and an action will lie by the assignee of the reversion on the covenants in the lease: *Sturgeon v. Wingfield*, 15 M. & W. 224.

The plaintiff must prove title by shewing mesne conveyances from original lessor: *Carvick v. Blgrave*, 1 B. & B. 531.

DEFENCE.

ASSIGNMENT OVER OF REVERSION BY PLAINTIFF.

The lessor cannot bring an action of covenant on the lease, after he has parted with his reversion, for any breach of covenant running with the land which has accrued subsequently to the grant of the reversion; but the action can be brought only by the assignee of the reversion. The defendant may therefore set up 32 H. VIII., c. 34. This statute only applies to leases by deed.

ASSIGNMENT OVER OF TERM BY DEFENDANT.

In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned over the term before breach, for the assignee is only liable for those breaches which have occurred while he is assignee; but for those breaches he may be sued even after he has parted with the term.

The defendant must prove that the whole term has been legally transferred by him to another, i.e., when necessary by deed. See R. S. O. 1897, c. 119, s. 7.

SURRENDER.

A surrender of a lease must be by deed, not being of an interest which might by law have been created without writing: *R. S. O. 1897, c. 100, s. 7.*

There may also be a surrender by act or operation of law. Anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises amounts to a surrender by operation of law: *Phene v. Poplewell*, 12 C. B. N. S. 340. See *Ontario v. O'Dea*, 22 A. R. 349; *Seldon v. Buchanan*, 24 O. R. 349.

A lessee, notwithstanding a surrender of his term by operation of law, retains an interest in the lease, and on the granting of a new lease to him by the lessor is entitled to retain the old lease.

The surrender of an old lease, implied from the acceptance of a new lease, is subject to an implied condition that the new lease is valid: *Knight v. Williams*, 70 L. J. Ch. 92; (1901), 1 Ch. 526; 83 L. T. 730; 49 W. R. 427.

On the surrender of a lease with a view to the grant of a new tenancy the tenant loses his right to remove fixtures unless he make some stipulation to the contrary, since the surrender *prima facie* includes fixtures, and the right ceases when the tenant's interest is gone, though in exceptional cases a termor has been allowed to exercise the right after the term was ended, where he had remained in possession in circumstances such that his possession could be regarded as a mere prolongation of the term: *Leschallas v. Woolf*, 77 L. J. Ch. 345; (1908), 1 Ch. 641; 98 L. T. 558.

Fitzherbert v. Shaw (1 H. Bl. 258); *Heap v. Barton* (21 L. J. C. P. 153; 12 C. B. 274); *Weeton v. Woodcock* (10 L. J. Ex. 183; 7 M. & W. 14); *McKintosh v. Trotter* (7 L. J. Ex. 65; 3 M. & W. 184); *Thresher v. East London Waterworks* (2 L. J. (o.s.) K. B. 100; 2 B. & C. 608), and *Roberts, In re; Brook, ex parte* (48 L. J. Bk. 22; 10 Ch. D. 100), followed.

EVICTION.

An action of covenant for non-payment of rent can be defeated by proof of an eviction of the defendant from the premises in question, either by the lessor or by one whose title is better than his. Not so if defendant has not given up possession of the whole: *Newton v. Allin*, 1 Q. B. 518. See *Shuttleworth v. Shaw*, 6 U. C. R. 539. May be apportioned: *Kinnear v. Aspden*, 19 A. R. 468.

To constitute an eviction at law the lessee must establish that the lessor, without his consent and against his will, wrongly entered upon the demised premises and evicted him and kept him so evicted: *Baynton v. Morgan*, 21 Q. B. D. 101, affirmed 22 Q. B. D. 74; *Prentice v. Elliott*, 5 M. & W. 616; *Fitzgerald v. Mandus*, 1 O. W. N. 879.

DISCLAIMER.

Peers v. Byron, 28 U. C. C. P. 250; *Lynett v. Parkinson*, 1 U. C. C. P. 144; *Kelly v. Wolff*, 12 P. R. 234.

(b) WHERE DEFENDANT IS SUED AS ASSIGNEE OF THE LEASE.

It will be necessary to prove either a transfer of the interest by deed, or facts from which an assignment may by law be inferred. It will be sufficient *primo facie* evidence to shew that the defendant has paid rent as assignee, or is in possession of the premises.

DEFENCE.

The defendant may prove that he is not an assignee of the whole term, but only an undertenant.

The defendant is not chargeable as assignee of the land for the entire rent if the assignment be of part only: *Curtis v. Spitty*, 1 N. C. 756.

As to what covenants run with land so as to bind the assignees, see *Spencer's Case*, 1 Sm. L. Cas. and Notes: *Berrie v. Woods*, 12 O. R. 693; *Ambrose v. Fraser*, 14 O. R. 551; *Emmett v. Quinn*, 7 A. R. 306.

(c) ACTION FOR RENT UNDER INDENTURE OF DEMISE.

An action lies by lessor, or grantee of reversion against lessee on his express covenant to pay rent, *non obstante* he have assigned the lease, and the lessor or his grantee have accepted the assignee as his tenant. But the lessor cannot, after he has parted with his reversion, bring an action of covenant for rent accrued due after grant of reversion under 32 H. VIII., c. 34.

The lessor may bring an action of debt against assignee of lessee by reason of privity of estate; but an action of covenant will not lie against original lessee after acceptance of assignee by lessee as his tenant: *Montgomery v. Spence*, 23 U. C. R. 39.

When a tenant holds over after the expiration of the term, and nothing is agreed on as to the terms of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to shew that such was expected by him, and that such expectation was known to and not repudiated by the tenant: *Elgar v. Watson*, 1 Car & M. 494, followed.

In such a case the tenant was notified in writing within a month that the rent would be increased after another month, and paid two month's rent at the increased rate, without objection: Held, that she was liable for rent, at such increased rate for the remaining

months of her occupancy, without deciding whether a new tenancy from year to year had been created or not: *Winnipeg Land and Mortgage Corporation v. Witcher*, 15 Man. L. R. 423, 1 W. L. R. 551.

The demise may be proved by production and proof of a lease executed by the plaintiff and accepted by the defendant, or by proof of the execution of it by the defendant.

DEFENCE.

Payment.

Readiness to pay on land good in case of debt for rent; not good in action on covenant.

Statute of Limitations.

An instance where it was doubtful whether the assignment should be treated as of the reversion or of future rent accruing out of the land, and so void as not under seal; or as an assignment of a chose in action, viz., of all moneys payable under the covenants of the lease, and so valid: *Galbraith v. Irving*, 8 O. R. 751. Any act of the tenant without the knowledge or sanction of the landlord can only affect his interest as tenant, and cannot prejudice the reversioner: *Dixon v. Cross*, 4 O. R. 465. A plea to an action of covenant for rent against the assignee of a lease, that all the estate of the lessee did not come to and vest in the defendant, is a good plea: *Annis v. Corbet*, 1 U. C. R. 303. A., as lessor, leases to B., and covenants to repair, and then assigns to C. *the rent for the term which B. is to have*. B. sues C. on A.'s covenant. Held, C. not liable, as he had no reversion, and the covenant would not run with the rent: *McDougall v. Ridout*, 9 U. C. R. 239. Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings. Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee: *Douglass v. Murphy*, 16 U. C. R. 113. In covenant for rent, a plea relying on the plaintiff's acceptance of the assignees as his tenants, and on his receipt of prior rent (not the rent sued for) from them, as relieving defendant, the lessee, from any further liability, is a bad plea, as being no defence to an action on an express covenant: *Stinson v. Magill*, 8 U. C. R. 271. Acceleration clause: *Baker v. Atkinson*, 14 A. R. 409; *Linton v. Imperial Hotel Co.*, 16 A. R. 337; *Mitchell v. McCauley*, 20 A. R. 272.

In actions to re-enter for breach of a covenant in a lease the Court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture: *Buckley v. Beigle*, 8 O. R. 85.

To avoid a lease under a proviso that upon breach of covenant by the lessee the lessor may "re-enter and thereupon the lease shall determine" the lessor must either actually re-enter or issue a writ for recovery of possession equivalent in law to re-entry.

In order that a writ for recovery of possession may be equivalent in law to re-entry it must be an unequivocal demand for possession. Principle of *Evans v. Davis* (48 L. J. Ch. 223; 10 Ch. D. 747), followed. *Jones v. Carter* (15 M. & W. 718), and dictum of Bayley, J., in *Fenn v. Smart* (12 East 444, 448), followed. *Moore v. Ulcoats Mining Co.*, 77 L. J. Ch. 282; (1908), 1 Ch. 575; 97 L. T. 854.

ACTION FOR BREACH OF COVENANT NOT TO ASSIGN

Now runs with land, R. S. O. 1897, c. 170, s. 6.

To prove the breach of a covenant not to assign or under-let it has been held to be *prima facie* sufficient to shew that a stranger was in the possession of the premises apparently as a tenant, and that on enquiry such stranger said he rented the house: *Doe d., Hindly v. Rickerby*, 5 Esp. 4.

In another case it was held not sufficient, for *non constat* that the party in possession was not a tortious intruder: *Doe v. Payne*, 1 Stark. 86.

Morris v. Williams, 6 B. & C. 41, seems to shew that mere possession would be evidence of an assignment. See *Crawford v. Bugg*, 12 O. R. 8.

The measure of damages in an action for a breach of covenant not to assign, etc., is such a sum of money as will put the plaintiff in the same position as if the covenant had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability: *Williams v. Earle*, L. R. 3 Q. B. 739. Where a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the mortgaged premises, he is liable, although the consent of the lessors may not have been procured, to pay to the assignor rent accruing due after the assignment, which the latter has been obliged to pay: *Brown v. Lennox*, 22 A. R. 442.

Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken, and they had retained the liability of the defendant instead of an inferior liability; but in estimating the value of the defendant's liability, allowance must be made for the vicissitudes of business and the uncertainty of life and health. *Williams v.*

Earle, L. R. 3 Q. B. 739, followed. *Munro v. Waller* (No. 2), 23 O. R. 574.

Where a lessor attaches to a license to assign the lease a condition which is, in the opinion of the Court, unreasonable, the Court can in an action by the lessee asking for the declarations, make declarations that the lessor is not entitled to impose the condition in question as a condition of giving his license, and that the lessee is entitled to assign his lease to the proposed assignee without any further consent of the lessor: *Young v Ashley Gardens Properties, Limited*, 72 L. J. Ch. 520; (1903), 2 Ch. 112; 88 L. T. 541.

Not to Carry on Business—Loss of Custom.—In an action for damages for breach of a covenant not to carry on a certain business, it was held that general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business. *Ratcliffe v. Evans* (1892), 2 Q. B. 524, applied and followed. 2. That damages were properly assessed up to the date of the judgment. *Stalker v. Dunwick*, 15 O. R. 342, followed: *Turner v. Burns*, 24 O. R. 28.

Upon a lease made pursuant to the Short Forms Act, containing a condition for re-entry on assigning or sub-letting without leave, when the lessor gives a license to assign part of the demised premises he may re-enter upon the remainder for breach of covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Sections 14 and 15 of the Landlord and Tenant Act, R. S. O. 1897, c. 170, are to be read together, the former referring generally to all cases, and making licenses to alien applicable for that particular instance only, the latter referring to specific cases of licensing alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a licensee to alien part of the demised premises, it was held that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave he might re-enter: *Baldwin v. Wanzer*, 22 O. R. 612.

ACTIONS FOR BREACH OF COVENANT AS TO TRADE ON PREMISES, AND FOR BREACH OF GOOD HUSBANDRY, ETC.

The proof of any act which, according to the natural and ordinary meaning of their words, is forbidden by these covenants, will entitle the plaintiff to a verdict.

A tenant can claim from the landlord who has exceeded the time specified in the lease for making repairs, only such damages as result directly from non-compliance with the conditions of the lease, and

which might have been foreseen at the time it was granted. As a consequence, if he did not know that the premises had been leased for a place of business the owner could not foresee that he might be called upon to pay any other damages than those resulting from the lease of an ordinary dwelling-house, and therefore he can not be held responsible in damages which arise from the fact that the tenant has been prevented from carrying on the trade of a tailor whilst the repairs were being effected at a place leased for the purpose of a residence only: *Leveille v. Pigeon*, Q. R. 26 S. C. 73.

ACTION FOR BREACH OF COVENANT TO INSURE.

Where the affirmative is peculiarly within the knowledge of the party charged, the presumption of the law in favour of innocence is not allowed to operate; but the general rule applies that he who asserts the affirmative has to prove it, and not he who avers the negative. Thus, in an action on a covenant for not insuring premises against fire, lies on the defendant to prove he has insured: *Tolman v. Portbury*, L. R. 5 Q. B. 288. Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings. Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee: *Douglass v. Murphy*, 16 U. C. R. 113. A covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised does not run with the land, and the lessee or his assigns have no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected: *McClary v. Jackson*, 13 O. R. 310. A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance. The lessee made an under-lease, omitting any such stipulation, and the under-lessee commenced the business of rectifying high wines. Injunction granted to restrain same: *Arnold v. White*, 5 Chy. 371.

The usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages operates as an equitable assignment of the insurance when effected: *Greet v. Citizens' Ins. Co.*; *Greet v. Royal Ins. Co.*, 5 A. R. 596; 27 Chy. 121.

The proper measure of damages in an action brought after the expiration of the term of a breach of covenant to repair, is the cost of putting the premises into a state of repair required by the covenant: *Joiner v. Weeks* (1891), 2 Q. B. 31.

The age and condition of a house at the beginning of a tenancy are to be taken into consideration in deciding whether there has been a breach of covenant to repair: *Lister v. Lane* (1893), 2 Q. B. 312.

On the letting of furnished lodging there is no implied agreement that the lodging shall continue fit for occupation during the term: *Sarson v. Roberts* (1895), 2 Q. B. 395.

The landlord who lets an unfurnished house in a dangerous condition, but being under no liability to keep it in repair, is not liable to his tenant or to a person using the premises for personal injuries happening during the term and due to the defective state of the house: *Lane v. Cox* (1897), 1 Q. B. 415.

ACTION FOR BREACH OF COVENANT TO REPAIR.

The proper measure of damages is the diminution of the value of the reversion at the time of action; See, further, *Minshull v. Oakes*, 2 H. & N. 793; *Smith v. Peat*, 9 Ex. 161.

Covenant to Repair—Liability of Landlord to Stranger Injured: *Cavilier v. Pope* (1905), 2 K. B. 757; (1906), A. C. 428, followed in *Cameron v. Young* (1908), A. C. 176, is conclusive against the plaintiffs right to recover. There can be no recovery by reason of the covenant because the plaintiff is a stranger to it: *Marcilli v. Donnelly*, 1 O. W. N. 195.

The principles of construction of covenants to repair laid down in *Lister v. Lane* (62 L. J. Q. B. 583; (1893), 2 Q. B. 212), and *Proudfoot v. Hart* (59 L. J. Q. B. 389; 25 Q. B. D. 42), cases which deal with the liability of lessees' covenants are applicable to covenants by the lessor.

A covenant by the lessor to repair the external wall or any part of a building is a covenant to repair on notice and not otherwise: *Torrens v. Walker*, 75 L. J. Ch. 645; (1906), 2 Ch. 166; 95 L. T. 469; 54 W. R. 584.

There is no implied covenant on the part of a landlord to protect a tenant of the ground floor against water percolating through a defective roof. A tenant taking part of a building in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects. *Rogers v. Sorell*, 14 Man. L. R. 450, specially referred to. *Barker v. Ferguson*, 16 O. L. R. 252; 11 O. W. R. 257.

The lessor of the basement of a building is liable, having regard to his obligation to afford the tenant proper enjoyment of the demised premises, for damages caused to the tenant by a leakage of water due to the bad condition of the pipes in the floor above, which he himself occupies: *Beaudoin v. Dominion Clothing Co.*, Q. R. 34 S. C. 157.

To Repair.—In an action on a lease (having many years to run) for rent and non-repair of the premises: Held, that the reversioner, by reason of the length of the lease, was not restricted to nominal damages, but the measure of damages was the amount to which the reversion is injured by the premises being out of repair: *Atkinson v. Beard*, 11 U. C. C. P. 245.

ACTION FOR BREACH OF COVENANT TO PAY RATES AND TAXES.

An absolute covenant to pay rates is broken on non-payment, although no demand has been made on the tenant for payment: *Davis v. Burrell*, 10 U. C. B. 821.

Where lease contains no provision as to taxes, the landlord must pay them: *Dove v. Dove*, 18 U. C. C. P. 424.

Held, that under the wording of the covenant to pay "all taxes, rates, duties, and assessments whatsoever . . . now charged, or hereafter to be charged, upon the said demised premises," the defendant was liable for local improvement taxes, and for the additions made under the Assessment Act, year by year, to the amount of the taxes in arrear, or additions made by the municipality: *Boulton v. Blake*, 12 O. R. 532.

ACTION FOR BREACH OF COVENANT FOR TITLE.

The covenants for title on which actions are brought are principally: A covenant that the grantor is seized in fee, or has power to convey; for quiet enjoyment and for freedom from incumbrances.

The measure of damages for such a breach is the difference between the value of the property as purported to be conveyed and that which the grantor had power to convey: *Spoor v. Green* (43 L. J. Ex. 57; L. R. 9 Ex. 99), followed.

Turner v. Moon (70 L. J. Ch. 822; (1901), 2 Ch. 825), followed. *Great Eastern Railway v. Fisher*, 74 L. J. Ch. 241; (1905) 1 Ch. 316; 92 L. T. 104; 53 W. R. 279.

No action will lie on the covenant for title when the grantor had a good title at the time of conveying, although the plaintiff experienced delay and expense in getting into possession: *Carr v. Dunn*, 9 U. C. R. 246. In an action for breach of covenant of good title, the measure of damages is the purchase money paid with interest. No allowance is to be made for the improvements or increased value: *McKinnon v. Burrows*, 3 O. S. 590; *Grant v. Robertson*, 8 U. C. R. 370.

Where plaintiff (lessee) was evicted by title paramount to lessor: Held, he could not recover. A covenant for quiet enjoyment under

the Short Forms Act is limited to acts of lessor and those claiming under him: *Davis v. Pitchers*, 24 U. C. C. P. 516. See *Snarr v. Baldwin*, 11 U. C. C. P. 353; *Bellamy v. Barnes*, 44 U. C. R. 315.

Covenant against incumbrances, measure of damages: *Connell v. Boulton*, 25 U. C. R. 444.

Against Incumbrances.—Where the vendee of lands, who had himself after purchasing mortgaged the property, brought action for breach of covenant against incumbrances, and the mortgage constituting the breach covered all lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it: Held, that the measure of damages was the whole amount due on the mortgage, which should be paid into Court to insure its reaching its proper destination: *McGillivray v. Mimico Real Estate Security Co.*, 28 O. R. 265.

Against Incumbrances—Taxes.—Upon a breach of covenant a party is liable only for such damages as are the natural consequence of his act or omission. Where, therefore, the vendee of land allowed it to be sold for taxes, which had accrued during his vendor's time, and neglected to redeem it within the year afterwards: Held, that he could not as of right recover damages to the value of the land so allowed to be sold: *McCollum v. Davis*, 8 U. C. R. 150.

For Quiet Enjoyment—Deducting Amount of Former Award.—During the plaintiff's ownership of a mill site the Government constructed a breakwater at the mouth of the river, and the plaintiff had been awarded damages "on account of the penning or damming up of the waters by the constructing of the breakwater and forcing this action: Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected the plaintiff to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and this action on the covenant for quiet enjoyment were not the same, the defendants were not entitled to deduct the money recovered from the Government from the amount recovered for damages for their breach of contract: *Platt v. Grand Trunk R. W. Co.*, 12 O. R. 119.

For Title.—W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land so conveyed was subsequently claimed by one R., and an action for ejectment was brought by him to recover possession of it, and D. instituted proceedings under the covenant against B. Under these circumstances W. executed to his vendee a mortgage to indemnify him against all damages, costs and charges in respect of the action of covenant. B. subsequently compromised with R. respecting his claim: Held, that W.'s estate was

only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee on the occasion of the compromise: *Hart v. Bown*, 7 Chy. 97.

The money ordered to be paid into Court: *Boyd v. Robinson*, 20 O. R. 404. Approved, *Newburn v. McKelcan*, 19 A. R. 739; *McGillivray v. Mimico Real Est. Co.*, 28 O. R. 265.

Where the lessor has not shewn a good title to grant the lease until after the grant of the lease, interest on arrears of rent does not begin to accrue until the time of good title shewn: *Canadian Pacific Railway v. Toronto Corporation*, 74 L. J. P. C. 15; (1905), A. C. 33; 91 L. T. 703; 21 T. L. R. 44.

ACTION FOR BREACH OF COVENANT TO YIELD UP POSSESSION OF PREMISES AT THE END OF THE TERM.

The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he is entitled to a sum equivalent to the rent he has lost, and to the costs of an ejectment where necessary: *Henderson v. Squire*, L. R. 4 Q. B. 170.

Where a lessee took a lease of premises for two years and covenanted to leave the premises without notice at the end of that time: Held, that on ejectment, brought by the lessor at the end of the term, the lessee could not set up a former lease to him for a longer period: *Doe d. Wimburn v. Kent*, 5 O. S. (U. C.) 437.

ACTION FOR DOUBLE VALUE.

Under 4 Geo. II., c. 28, R. S. O. 1897, c. 342, s. 20, against tenant wilfully holding over after:—

1. Determination of term.
2. Demand made.
3. Notice in writing.

Plaintiff must prove the demise, the determination of the term, the demand and the value.

Notice to quit includes a demand.

In estimating value only the land and its real easements and appurtenances can be included.

DEFENCE.

The defendant may shew that the plaintiff has waived the notice to quit on demand of possession: and where the plaintiff has accepted

rent due from the defendant after the expiration of notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value or as a waiver of it: *Ryall v. Rich*, 10 East 52.

There is also an action for double value under illegal distress, which see.

ACTION FOR DOUBLE RENT.

By 11 Geo. II., c. 19, s. 18, R. S. O. 1897, c. 342, s. 21, if any tenant shall give notice to quit, and does not quit, he shall pay double rent.

The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and actually gives a valid notice sufficient to determine it: *Johnstone v. Huddlesone*, 4 B. & C. 922.

ACTION ON BOND.

See, also, Action on Guarantee.

See 8 and 9 W. III., c. 11, s. 8; R. S. O. 1897, c. 324, s. 4.

The plaintiff must set out the breaches he relies upon, in two ways:—

1. By *assignment*, which is traversable.
2. By *suggestion*, which is not traversable.

In latter case defendant cannot shew excuse of performance. **But plaintiff must shew that bond produced is same on which judgment obtained.**

The jury are to find nominal damages and costs as well as damages on the breaches; but plaintiff cannot recover more than the penalty and costs: *Greer v. Johnston*, 40 U. C. R. 116.

Held, per Tuck, C.J., McLeod and Gregory, JJ., that in an action on a bond conditioned for maintenance, where the breach assigned is refusal to maintain, the plaintiff may recover the whole penalty as damages. In assessing the damages the jury are not limited to those suffered up to the time of the issue of the writ; but they may take into consideration the damages up to the time of the trial and that there has been a complete breach of the condition. *Per* Hanington, Landry and Barker, JJ., that judgment may be entered for the penalty upon which subsequent breaches may be assigned under 8 and 9 W. III. c. 11, but damages can only be assessed on the breaches assigned up to the commencement of the action: *Barthelotte v. Melanson*, 35 N. B. Reps. 652.

The plaintiffs entered into a contract with the "Estevan School Board of Estevan" for the construction by the plaintiffs of a school

building for the Estevan School District No. 257, according to plans and specifications incorporated into the contract, which required that the contractors should "give a surety bond equal to the amount of his contract." The contract provided for a bond to be given to the corporation in the sum of \$5,000. The plaintiffs filed a bond for \$5,000, but the obligees were not the defendants, whose proper style was "The Board of Trustees for the Estevan School District Board of Estevan in the Province of Saskatchewan:"—Held, that, although the bond was enforceable notwithstanding the misnomer, the defendants were justified in refusing to accept a bond which did not comply with the provisions of the contract; and it was immaterial that the objection to the bond made by the defendants was not on account of the misnomer: *Greenwood v. Estevan School Trustees*, 13 W. L. R. 270.

DEFENCE.

PAYMENT.

Payment before the day fixed for it was always evidence of a plea of payment at the day; but before Statute 4 and 5 Anne, c. 3, s. 12, R. S. O. 1897, c. 324, s. 8, payment after the day fixed, or at a different place from that fixed, was not pleadable in bar. By that Act payment of principal and interest due on a mere money bond made before action is a bar, though not made exactly according to the condition.

The defendant must prove the defence, though such defence is in fact a denial of the breach of the condition: *Penny v. Foy*, 8 B. & C. 8.

BREACH.

Brantford, &c., R. Co. v. Huffman, 19 S. C. R. 336.

EXECUTION IN BLANK.

Reg. v. Chesley, 18 S. C. R. 306.

A person giving a bond to hold harmless in any actions that may be brought, and to pay all costs and charges thereby accruing, is bound to indemnify as well against the legal result of any such actions as for the trouble and expense occasioned by them to the person to be indemnified: *Hamilton v. Davis*, 1 U. C. R. 176.

On a bond given to executors, they may sue either as executors or in their own right: *Davis v. Davis*, 5 O. S. 551. Action on a bond that G. C., his executors, &c., should account and pay over on request. Defendant was one of three executors of G. C., but did not

act in the affairs of the estate, and lived at some distance; and a request to pay over all moneys, &c., had been made upon the other two executors, but not on him. It was admitted, however, that all the executors had been sued on this bond, and served with process and declaration before the commencement of this action:—Held, that the demand was sufficient. *Quære*, whether, as a general rule, when a demand upon executors is necessary it must be made upon all. *Semble*, not in order to support an action on a contract of the testator, but that a demand upon one would be insufficient to cast any new or personal liability on another executor: *County of Bruce v. Cromar*, 22 U. C. R. 321.

See *Strickland v. Williams*, 68 L. J. Q. B. 241; (1899) 1 Q. B. 382; 80 L. T. 4.

ACTION FOR PENALTY.

In an action of debt on a penal statute the general evidence for the plaintiff is proof of the commission of the act upon which the penalty has accrued, and, if a time be limited by the statute for bringing the action, proof that the action was brought within the time.

The Crown alone can sue for the penalty where the statute does not say who shall recover it, unless an interest therein is given to some person by the statute expressly or by sufficient implication as if it is created for a party grieved: *Clarke v. Bradlaugh*, 8 App. Cas. 354 D. P.

The writ is in all cases the commencement of the action, and the statement of claim will show the day on which it is issued. When the writ has been renewed proof of the renewal is requisite.

An action for penalty under 13 Eliz., c. 5, may be joined with an action under that Act to set aside a fraudulent conveyance: *Miller v. McTaggart*, 20 O. R. 617.

By 21 Jac. I., c. 4, s. 4, not guilty by statute may be pleaded.

Held, that 18 Eliz., c. 5, R. S. O. 1897, c. 324, ss. 28, 29, is in force in Ontario, and therefore the plaintiff, an infant, suing by his next friend, could not maintain an action for a penalty under the Election Act: *Garrett v. Roberts*, 10 A. R. 650.

No damages are recoverable in a penal action except the penalty: *Frederick v. Lookup*, 4 Burr. 2018.

Action for proof of offence necessary even where the defendant makes default: *Mason v. Mahar*, 1 N. S. V. 314.

PART III.

DEFENCES

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RULE PASSED 23RD APRIL, 1910.

1304. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.

RULES OF PLEADING RELATIVE TO DEFENCES.

Some defences are only applicable to particular actions. Such defences will be dealt with under the heading of the action to which they apply. There are other defences which are a sufficient answer to any species of action. It is convenient to discuss these general defences before proceeding to the various species of actions. They are presented alphabetically, more in the shape of definition than at any length. Their application to any given case will depend on the circumstances of the case. The definition of the defence will be some guide as to its applicability.

Before entering on the subject of the defences themselves it may be well to recapitulate the substance of the rules of pleading relative to defences.

First, as to *admissions*:

C. R. 269.—Each party shall admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice by his own statement or otherwise that he admits, for the purposes of the action, the truth of the case generally, or of any part of the case stated or referred to in the statement of claim or defence of the opposite or any other party.

C. R. 270 provides for the manner of making admissions in pleading.

Second, as to *allegations in pleadings*:

C. R. 271. Each party in any pleading shall raise all matters which shew the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts shewing illegality either by statute or common law or Statute of Frauds.

C. R. 272. Save as otherwise provided,* the silence of a pleading as to any allegation contained in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegation.

C. R. 282. Where a contract is alleged a denial of the contract shall be construed only as a denial of the making of the contract in the contract only.

* C. R. 279.—Facts presumed need not be stated. C. R. 280.—Denial of representative capacity of opposite party required specifically.

fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

C. R. 285 relates to an action for the recovery of land (page 474).

Plea of
not guilty
by statute.

C. R. 286. Nothing in these rules shall affect the right of a defendant to plead not guilty by statute.* A defence of not guilty by statute shall have the same effect as heretofore.

See also C. R. 276, 277, 278. (Malice—Notice—Implied Contract.)

It is necessary to refer to these rules of pleading, because the course to be taken at the trial depends, in the first instance, on the pleadings before the Court, and the Court, under C. R. 271, will not allow a party to be taken by surprise. Therefore, while amendment is liberally allowed, the countervailing principle of C. R. 271 is frequently applied. See this subject considered, page 8.

It is a good defence for a debtor sued on a debt for the discharge of which he had originally given a bill of exchange to plead that at the time at which the writ was issued against him the bill, although it had been dishonoured, was outstanding in the hands of a third party; and the fact that the creditor had subsequently obtained possession of it is not a sufficient remedy of the original defect in his cause of action: *Davis v. Reilly*, 66 L. J. Q. B. 844; (1898) 1 Q. B. 1; 77 L. T. 399; 46 W. R. 96.

We now proceed with the definition of the various defences. They appear in alphabetical order as follows:

ACCIDENTAL FIRE. (See Page 327.)

Ont. Statutes 1907 c. 23, s. 41, is as follows:

(1) No action shall be brought against any person in whose house or building or on whose estate any fire shall accidentally begin, nor shall any recompense be made by him for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding; provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

(2) The provisions of s.-s. 1 are hereby declared to have been in force on and since the 1st day of July, 1867.

*The plea of "not guilty by statute" puts in issue not only the defences peculiar to the statute, but all that would have arisen at Common Law; e.g., in an action for excessive distress a plea of "not guilty," under 11 Geo. II., c. 19, s. 21, puts in issue not only the matter of justification, but also the tenancy and ownership of the goods. The words "by statute," together with the reference to the statute, must appear in the margin of the statement of defence.

ACCORD AND SATISFACTION.

An agreement which need not be by deed, the effect of which is to discharge the right of action possessed by one of the parties to the agreement: see Judicature Act, R. S. O. 1897, c. 70, s. 58 (8); *Brundage v. Howard*, 13 A. R. 337; *Harvey v. Johnston*, 20 A. R. 412; *Haist v. G. T. R.*, 22 A. R. 504.

The acceptance of a payment under a composition deed discussed: *Weese v. Banfield*, 22 A. R. 488. Compare cases of *Gomer v. Harris*, 11 U. C. R. 16; *Brown v. Jones*, 17 U. C. R. 50; *Paisley v. Broddy*, 11 P. R. 202. By subsequent contract: see *Coristine v. Menzies*, 2 M. L. R. 84. Whether or not a bill or note is taken in discharge and satisfaction of a pre-existing debt is a question for the jury, and where the jury was unable to say whether or not a draft or note was so taken in discharge and satisfaction and a verdict was thereupon entered for the plaintiff, the Court sent the case down for a new trial: *Dunn et al. v. Fredericton Boom Co.*, 1 P. & B. 575 (N.B.). The acceptance of a conveyance by way of mortgage for a simple contract debt of a larger amount than that secured and covenanted to be paid by the mortgage is a satisfaction of the simple contract debt for the larger amount: *Allen v. Alexander*, 11 U. C. C. P. 441, and 541. Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft payable to the solicitor's order as payment "in full," and the solicitor indorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance: *Day v. McLea*, 22 Q. B. D. 610, applied. Section 58, s.-s. 8, Judicature Act, as to part performance of an obligation in satisfaction considered: *Mason v. Johnston*, 20 A. R. 412.

An agreement by a debtor to pay, and the creditor to accept payment of, an existing debt by instalments is *nudum pactum*. Therefore, where a judgment creditor put in an execution upon the goods of the judgment debtor, an agreement by the debtor to pay part of the debt at once and the balance by monthly instalments affords no consideration for a promise by the execution creditor to withdraw the sheriff: *Hookham v. Mayle*, 22 T. L. R. 241.

Keeping a cheque marked in full is not conclusive evidence of accord and satisfaction, and it may be shewn that the cheque was not accepted in full. *Day v. McLea*, 22 Q. B. D. 610, followed. In order to establish accord and satisfaction of a debt by payment of less than the amount due, it must be shewn that such payment was made in pursuance of an agreement for that purpose, or that it was so accepted by the creditor: *McPherson v. Copeland* (1909), 1 Sask. L. R. 519, 9 W. L. R. 623.

AGENCY.

A contract made by an agent is complete before he has advised his principal of it and before the latter has sent a ratification to the other party to the contract: *Hubbard v. Thompson Co.*, 5 Q. P. R. 372.

A document executed by an agent in the name of his principal, the subscribing witnesses to which are dead, or out of the Province, can be proved by proving the handwriting, *i.e.*, by the same evidence which would be sufficient to prove its execution by the principal: *Dickson v. Jarvis*, 5 O. S. 694. The general rule is that clerks of an agent are not agents of the principal: *Hope v. Dixon*, 22 Chy. 439. Where a bill is drawn by a person signing as agent of a company, the acceptance admits the signature and authority of the agent, and precludes any technical objections as to the composition or description of the company or their ability to draw the bill: *Bank of Montreal v. DeLatre*, 5 U. C. R. 362. The question of agency is a question of fact for the jury, there being some evidence to go to them of which the Judge must decide: *De Blaquiere v. Pecker*, 8 U. C. C. P. 167.

By leaving a mortgagor in possession the mortgagee impliedly authorizes him to carry on his business, and to hire and bring in such fixtures as are necessary for his trade, and to agree with the owners as to their lawful possession, and cannot claim to include in his security trade fixtures set up or removed under such agreements: *Gough v. Wood, C. A.* (1894), 1 Q. B. 713.

An agent appointed to receive money for another must in the ordinary course of business be his agent also to give a receipt for it: *Bedson v. Smith*, 10 Chy. 292.

1. An agent, who, by misrepresentation of his authority procures a person to enter into an agreement with his principals for the purchase of land, will be personally liable to the intending purchaser for damages in an action for specific performance against himself and his principals if they afterwards repudiate the agreement and prove that the agent had no authority to bind them. 2. In such a case the plaintiff is entitled not only to the expenses actually incurred, but also to the loss of the profit he would have made if the bargain had been carried out: *Maneer v. Sanford*, 15 Man. L. R. 181.

Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor to reasonably believe that the agent has paid the debt or discharged the obligation, and in consequence of such belief pays or settles or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny as between himself and the principal that the debt has been paid or the obligation discharged: *Gentles v. The Canadian Pacific Railway*, 14 O. L. R. 286.

Where an action done by an agent on behalf of his principal is authorised by the terms of an authority given to the agent by the principal, the act is binding on the principal as to all persons dealing in good faith and for valuable consideration with the agent, and the principal cannot escape from liability upon the ground that the act was done by the agent in abuse of his authority, for his own purposes and not in the interests of the principal: *Hambro v. Burnand*, 73 L. J. K. B. 669 (1904) 2 K. B. 10; 90 L. T. 803; 52 W. R. 583; 9 Com. Cas. 251; 20 T. L. R. 398. Extent of principal's liability.

Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else, other than his principal, such representation cannot be called that of the principal. In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it: *Richards v. Bank of Nova Scotia*, 26 S. C. R. 381. Unauthorized representation.

A principal may, in the absence of fraud on his part, ratify and adopt a contract made by his agent without his authority, notwithstanding that other parties to it have before ratification repudiated it, and notwithstanding that the agent acted with fraudulent intent: *Tiedemann and Ledermann Freres, In re*, 68 L. J. Q. B. 852; (1899) 2 Q. B. 66; 81 L. T. 191. Ratification.

A contract made by a person intending to contract on behalf of another, but without his authority, may be ratified by that other and so made his own, although the person who made the contract previous to time of making it, be acting on behalf of a principal: *Durant v. Roberts* (1900), 1 Q. B. 695.

Where a principal allows an agent to act as if he were principal, the real principal will be liable for the acts of the agents, if done within the reasonable scope of the agent's authority in the particular business, notwithstanding any limitations which the real principal may have put on his agent's authority: *Waltan v. Fenwick* (1893), 1 Q. B. Liability of principal.

An agent of two independent and unconnected principals has no authority to bind his principals, or either of them, by the sale of goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent: *Cameron v. Tate*, 15 S. C. R. 622. Agent for two principals.

Where a purchase is made by an agent who disclosed the name of his principal, it is a question for the jury to determine to whom the credit was given; and where the evidence is conflicting the Court will not disturb the verdict: *Scott v. Curry*, Hil. T. 1834 (N.B.). An agent's subsequent written recognition of an oral contract, where such recognition was made in the performance of his duty in the Undisclosed principal.

carrying out of the contract: Held, binding on the principal for the purpose of taking the case out of the Statute of Frauds: *Ward v. Hayes*, 19 Chy. 239. The fraudulent act of an agent does not bind the principal unless it is done for the benefit of the principal, or unless he knows of or assents to it, or takes advantage of it: *Gibbons v. Wilson*, 17 O. R. 290. See this case in appeal, 17 A. R. 1, and *Burns v. Wilson*, 28 S. C. R. 207. In torts the principle of agency does not apply; each wrong-doer is a principal: *Ontario Industrial Loan and Investment Co. v. Lindsey*, 4 O. R. 473.

Bankers.

Bankers are subject to the principles of law governing ordinary agents, and therefore to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor: *Donogh v. Gillespie*, 21 A. R. 202.

Limited authority.

A person who deals with an agent, whose authority he knows to be limited, does so at his own peril, and if the agent exceeds his authority in a manner known to the person dealing with him, the principal is not responsible: *Russo-Chinese Bank v. Li Yau Sam*, 79 L. J. P. C. 60; (1910) A. C. 174; 101 L. T. 689; 26 T. L. R. 203—P. C.

"Holding out."

In order that the principle of "holding out" should in any case of agency be applicable the act done by the agent, and relied upon to bind the principal, must be one which the agent is held out as having a general authority on his principal's behalf to do.

Factors Act.

The word "agent" referred to in R. S. O. 1897, c. 150, "An Act respecting Contracts in relation to Goods entrusted to Agents," means one who is entrusted with the possession as agent in a mercantile transaction for the sale or for an object connected with the sale of the property. And an agent who has obtained possession of certain lumber from the master of a vessel, without authority from the owner, was:—Held, not to have been entrusted with the possession, and that the owner was entitled to recover the value of the lumber from a bona fide purchaser from the agent who had paid the agent: *Mashier v. Keenan*, 31 O. R. 658. See page 462.

Mercantile agent explained: *Hastings v. Pearson* (1893), 1 Q. B. 62.

A. being in possession of furniture under a hire and purchase agreement made with B., sold and delivered the same before the last payment had accrued due or been paid to C.: Held, that the sale to C., who had acted in good faith and without notice of B.'s rights, was valid under section 9 of the Factors' Act (1889): *Lee v. Butler* (1893), 2 Q. B. 318; see *Helby v. Matthews* (1895), A. C. 471.

The words "when acting in the ordinary course of business of a mercantile agent" in section 2, subsection 1 of the Factors Act, 1889, mean *actus* as a mercantile agent in the way in which such an agent would act if the particular transaction were one duly authorized by his principal: *Oppenheimer v. Attenborough*, 77 L. J. K. B. 200; (1908) 1 K. B. 221; 98 L. T. 94; 13 Com. Cas. 125; 24 T. L. R. 115—C. A.

To sustain an action against the employer for damages occasioned in the performance of a contract it must be shewn that the contractor is the authorized agent of the parties sought to be charged, or at all events that they subsequently ratified or adopted the work as their own: *Carroll v. Corporation of Plympton*, 9 C. P. 345.

The measure of damages for which an agent is responsible in consequence of his misrepresentations is the actual loss which the principal thereby sustains, and does not include the anticipated profit which the principal might have made if the representation had been true. *Cassatagioni v. Gibb* (52 L. J. Q. B. 538; 11 Q. B. D. 797) approved: *Salvasen v. Rederi Aktieselskabet Nordstjernen*, 74 L. J. P. C. 96; (1905) A. C. 302; 92 L. T. 575.

The measure of damages in such a case will be the profits that might reasonably be expected to result from the undertaking: *Grant v. Creelman, et al.*, 2 Thom. 37 (N.S.).

The principle laid down in *Collen v. Wright* (27 L. J. Q. B. 215; 8 E. & B. 647) is not confined to a simple case where a professed agent, acting without authority, induces a person to enter into a contract with a supposed principal, but has a wider application as stated in *Firbank v. Humphreys* (56 L. J. Q. B. 57; 18 Q. B. D. 54), and that principle is not affected by the decision of the House of Lords in *Derry v. Peek* (58 L. J. Ch. 864; 14 App. Cas. 337): *Oliver v. Bank of England*, 71 L. J. Ch. 388; (1902) 1 Ch. 610; 86 L. T. 248; 50 W. R. 340; 7 Com. Cas. 89.

Where a contract is induced by false representation of an agent, proof of knowledge or authorization of such representation on the part of the principal is not necessary to rescind the contract: *Milburn v. Wilson, Evans v. MacMicking* (1909), 2 Alt. L. R. 5.

Where an intending purchaser by disguising his intentions under the role of a disinterested friend, imposes on the confidence thus established, and induces the owner of land to accept an offer for the purchase of it, which probably would not otherwise have been accepted without independent investigation, specific performance of an agreement for sale thus procured will not be enforced. *Fellowes v. Lord Gwydyr*, 1 Sim. 63, discussed and distinguished: *Henderson v. Thompson*, 41 S. C. R. 445.

An agent who invests money for his principal without taking proper precautions as to the sufficiency of the security, is guilty of

negligence, and if the value of the security proves less than the amount invested, he is liable to his principal for the loss occasioned thereby. The measure of damages in such a case is not the amount lent, with interest, but the difference between the amount and the actual value of the land: *Lowenburg v. Wolley*, 25 S. C. R. 51.

Trade protection society.

No privilege or protection attaches to information supplied by a trade protection society to its customers which is injurious to the character of another: *Macintosh v. Dunn*, 77 L. J. P. C. 113; (1908) A. C. 390; 99 L. T. 64; 24 T. L. R. 705.

Mercantile agency.

A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness: *Robinson v. Dun*, 28 O. R. 21, 24 A. R. 287.

Auctioneer.

An auctioneer has an implied authority to sell without reserve, and if he does so, the vendor cannot set up as against the buyer a limitation of that authority not made known to the buyer. *Warlow v. Harrison* (29 L. J. Q. B. 14; 1 E. & E. 309) distinguished: *Rainbow v. Hawkins*, 73 L. J. K. B. 641; (1904) 2 K. B. 322; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508.

An auctioneer warrants his authority to sell, and if he sells without authority, although by innocent mistake, he is liable in damages to the purchaser for loss of bargain: *Anderson v. Croall*, 6 F. 153.

At an auction where by the conditions of a sale each lot was to be offered subject to a reserve price, the plaintiff bid for a lot a sum which was less than the reserve price. The auctioneer, thinking by mistake that the reserve price had been reached, knocked down the lot to the plaintiff. He immediately discovered his mistake and withdrew the lot, and refused, though requested by the plaintiff, to make and sign a memorandum of the contract of sale:—Held, that inasmuch as both the bid and the acceptance of the bid at the auction were conditional on the reserve price being reached or exceeded, the plaintiff was not entitled to maintain an action against the auctioneer either for breach of duty or for breach of warranty of authority: *McManus v. Fortescue*, 76 L. J. K. B. 393; (1907) 2 K. B. 1; 96 L. T. 444; 23 T. L. R. 292.

The defendant was induced to purchase the pictures by misrepresentations fraudulently made by the owner, but not fraudulently made by the auctioneer: Held, that, in an action upon the cheque, the auctioneer was entitled to recover the amount of the cheque from the defendant: *Hindle v. Brown*, 98 L. T. 791 C. A.

Duty of architect in superintending erection of buildings: see *Badgley v. Dickson*, 13 A. R. 494.

Where an architect is instructed to prepare plans for a building Architect, to cost not more than a certain sum, but which building must also comply with other conditions as to accommodation under a municipal by-law, then, although, in order to comply with such other conditions the tenders sent in are in excess of the sum mentioned, the architect cannot recover his services: *Wilson v. Ward*, 14 L. C. R. 131, 9 W. L. R. 481.

A vendor who has placed his property in the hands of his agent Real estate for sale on commission will not be liable to the agent for commission agent if he afterwards sells to a purchaser in ignorance that such purchaser has been sent to him by the agent (*Locators v. Clough*, 17 Man. L. R. 659) unless there are circumstances sufficient to put the vendor upon inquiry as to whether the purchaser was not in fact sent to him by the agent: *Hughes v. Houghton Land Co.*, Man. L. R. 686, 9 W. L. R. 646.

Estate agents as such have no general authority to enter into contracts for their employers. Their business is to find offers and to submit them to their employers for acceptance. If any authority to enter into contracts is given in any case it must be proved, and cannot be inferred from the relation existing between the parties: *Thuman v. Best*, 79 L. T. 239.

The defendant, knowing that the plaintiff was a land agent, arranged with him to procure a purchaser for his house and lot at a named price. Through the plaintiff's intervention a proposed purchaser was procured and a purchase discussed. Subsequently, and as a result of the discussion, a lease was entered into of the premises for three years, with a collateral agreement giving the purchaser the option of purchasing within a year, which he exercised: Held, that the plaintiff was entitled to his commission from the defendant: *Morson v. Burnside*, 31 O. R. 438.

Instructions given to estate agents to find a purchaser and negotiate a sale, held not to amount to an authority to bind the vendor by a contract. To bind the vendor there must be an express authority to the agent to enter into a contract on behalf of the vendor: *Chadburn v. Moore* (1892), W. N. 126.

Where an agent is authorised to underwrite policies "in the name and on behalf of" principals, such a mandate does not authorise agent him to make a contract which, although the agent purports to make it on behalf of the principal, is in fact to enure only for the benefit of the agent. If a person contracts with an agent, it is for him to see as best he can that the agent is acting within his authority: *Hambro v. Burnard*, 72 L. J. K. R. 662 (1903) 2 K. R. 290, 89 L. T. 180; 51 W. R. 652; 8 Com. Cas. 252.

Although an agent for the sale of land having only an oral authority from the owner may sign for him a contract of sale of

land, which will be binding under the Statute of Frauds, yet if disputed the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest and most convincing kind, and such as bears overwhelming conviction on its face: *Gilmour v. Simon*, 15 Man. L. R. 205.

Commis-
sion.

In an action by an agent to recover the amount of his commission he must shew that he has produced to the principal a purchaser ready, willing, and able to enter into a binding agreement to purchase; and the agent is entitled to his commission if, the parties having been shewn to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor. *Grogan v. Smith*, 7 Times L. R. 132, followed: *Bagshawe v. Roland*, 7 W. L. R. 158, 13 B. C. R. 262.

A real estate agent employed to find a purchaser for land who finds a purchaser ready and willing to purchase upon terms, which although not identical with those in contemplation at the time of his employment, are satisfactory to the owner, is entitled to compensation for his services, notwithstanding that no sale is actually made, by reason of refusal of the owner to sell the property for reasons unconnected with the terms of purchase: *McKenzie v. Champion*, 12 S. C. R. 649, followed.

Where in the proposed vendor's instructions to the agent there is not something to indicate that it was his intention to give the agent authority to sell, it will be inferred that the authority extended only to finding a purchaser: *Boyle v. Grassick*, 6 Terr. L. R. 232; 2 W. L. R. 99, 284.

The defendant employed the plaintiffs, real estate agents, to sell certain property at a certain price, agreeing to pay a commission. They procured a purchaser able and willing to pay the price and submitted a written offer. On receipt of the offer, the defendant, making no objection to it, said he wanted to look into the matter and used the offer as a lever to close a pending offer of his own to another person at the same price, in order to save the commission: Held, that the plaintiffs had done all they were called upon to do when they obtained a purchaser ready and willing to purchase and that they were entitled to their commission: *Marriott v. Brennan*, 14 O. L. R. 508.

Agent to
buy goods. If an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing them. If the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced, which has been used in the purchase, as well as to the unexpended balance: *Carter v. Long & Bisby*, 26 S. C. R. 430.

A driver employed by a laundryman to deliver laundered goods ^{Laundry-} to customers, is not liable for credit given them, when it is estab- ^{man's} lished that all the drivers in the same employ were in the habit of ^{driver.} doing so, to the knowledge of their employer. The driver has the right to take credit for sums paid by him to customers for goods lost, and due to them by his employer: *Shovelin v. Hanson*, Q. R. 30 S. C. 360.

When the buyer of goods from an agent knows that the person ^{Buyer of} he is dealing with is only an agent, he cannot set off a claim against ^{goods.} the agent in an action by the principal for the price of the goods, although the ownership of the goods may have been transferred to another principal before he bought and without his knowledge. So far as the claim of set-off is concerned, it is immaterial whose agent the buyer thought him to be: *Wood v. John Arbuthnot Co.*, 16 Man. L. R. 320.

A principal can ratify a contract made by his assumed agent, ^{Ratifica-} after the principal has repudiated it and has refused to be bound by ^{tion.} it. The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had authority to do the act at the time the act was done by him: *Tuckles & Mills v. Western Assurance Co.*, 40 N. S. R. 327.

Promoters of a company employed an agent to solicit subscrip- ^{Promoters.} tions for stock, and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters: Held, that the latter having benefited by the sum paid by W., were liable to re-pay it though they did not authorize it, and had no knowledge of the false representations of their agent. Held, that neither express authority to make the representations, nor subsequent ratification or participation in benefits were necessary to make the promoters liable; the rule *respondeat superior* applies as in other cases of agency: *Milburn v. Wilson*, 31 S. C. R. 481.

Where promoters proposed to acquire property and turn it over to a company to be formed, in exchange for bonds and stock, it was held, that there was no fiduciary relationship existing between the parties, such as partners or agents, and no agreement between the promoters would bind the company to be formed: *Kalner v. Barter* (1866), L. R. 2 C. P. 174; *Natal Land Co. v. Pauline* (1904), A. C. 120, and *Bright v. Hutton* (1852), 3 H. L. C. 431, followed. *Garvin v. Edmondson* (1909), 14 O. L. R. 435.

Liability of promoter: *Re Hess Manufacturing Co.*, 23 O. R. at p. 198.

Company or corporation. Power of company to carry on business after winding up proceedings have commenced: *Re Haggart Bros.*, 20 A. R. 597.

Discretionary power of Court: *Wakefield Co. v. Hamilton Co.*, 24 O. R. 107.

Where the power to contract exists, a person contracting with the company need not enquire whether the proper formalities have been complied with in a contract under its corporate seal: *Sheppard v. Bonanza*, 25 O. R. 305.

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted, and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations: *Bernardin v. Municipality of North Dufferin*, 19 S. C. R. 581.

The doctrine that a corporation may contract without seal for the purchase or sale of property, necessary for carrying on the business for which the corporation has been created, does not apply to a case where the power of the corporation to do the act is not to come into existence unless or until a certain prescribed condition has been performed by them which has not been performed: *Holmes v. Trench* (1898), 1 Ir. R. 319.

Shipping agent.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped. Where a shipper accepts what purports to be a bill of lading under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation, merely upon the ground that he did not read it; but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent: *N. W. Transportation Co. v. McKenzie*, 25 S. C. R. 38.

Solicitors' partnership.

On dissolution of a partnership between solicitors, in the absence of express stipulation, each partner is entitled to use the old firm name, provided such use does not expose the other partners to liability or risk. Risk for this purpose means appreciable risk in a business sense: *Burchell v. Wilde*, 69 L. J. Ch. 314; (1900), 1 Ch. 551; 82 L. T. 576; 48 W. R. 491.

Partner.

A partner who on his own account makes a purchase of a property or business which is not within the scope of the partnership and is neither in rivalry or in any way connected with the partnership, and who acts on information not acquired by reason of his position as partner, is not liable to account to his co-partners:

Cassels v. Stewart (6 App. Cas. 64), followed. *Trimble v. Goldberg*, 75 L. J. P. C. 92; (1906), A. C. 494; 95 L. T. 163; 22 T. L. R. 717.

A partner entrusted with possession of goods of his firm for the purpose of sale may either as partner in the business, or as factor for the firm, pledge them for advances made to him personally; and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods notwithstanding notice that the contract was with an agent only: *Dingwall v. McBean*, 30 S. C. R. 441.

In an action by partners brought after the Act allowing parties in a cause to be witnesses, it is not necessary to call the plaintiffs to prove the partnership—it may be proved by other evidence in the usual way, by parties having dealings with them as such, or by persons having means of knowing who composed the firm: *Rankin v. Harley*, 1 Han. 271 (N.B.).

A stockbroker on the death of his client has no authority, ~~ex-Stock-~~ ^{broker.} ~~press~~ or implied, to carry over shares purchased for his client to the next settling day, but should close the account: *Phillips v. Jones* (4 Times L. R. 401), followed. *Overweg, In re*; *Haas v. Durant*, 69 L. J. Ch. 255; (1900), 1 Ch. 209; 81 L. T. 776.

The defendant in giving authority to the plaintiffs to do business on the stock exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the stock exchange, and, therefore, to have authorized the sale of his shares on failure to supply them with the requisite funds: *Forget v. Baxter* (1900), A. C. 467.

As pointed out in *Conmee v. Securities Holding Co.*, 38 S. C. R. 601, brokers are accustomed and entitled to consider the shares held by them for clients when all of one sort as being practically one fund. They are not bound to ear mark any particular shares for any particular client. In *Clark v. Bailie*, 19 O. L. R. 545, proof was given of an agreement or custom binding upon bankers and brokers that shares would be given up upon payment of the amount owing in respect to them alone: *Hutchinson v. Jaffray & Cassels*, 1 O. W. N. 481.

There is no obligation on a broker in the absence of the customer's orders to sell shares during a falling market after he has demanded further margins and received no reply from his customer, and therefore if he does not sell the stock under such circumstances he has no responsibility for any loss that may arise to the customer: *Kerr v. Murton*, 7 O. L. R. 751.

Where credit is given to an abstract entity, such as a club, the Club creditor may look to those who in fact assumed to act for it, and

those who authorized or sanctioned that being done; at all events where he did not know of the want of authority of the agent to bind the club. Review of English cases on this subject. The liability in such cases is not several but joint. In an action begun against an unincorporated company as a partnership, to recover a sum for costs paid by the plaintiffs, an order in chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties: *Aikens v. Dominion Live Stock Association of Canada*, 17 P. R. 303.

Voluntary
associa-
tions.

These voluntary associations are not restricted in their actions by the limitations of legal evidence as held in the Courts the rules of evidence have grown up as the result of practice, not by law of the land: *Duke of Beauford v. Crawshaw, Har. & Ruth*, at p 646. And by parity of reason such lines of evidence must be used by private clubs and corporations as are within their competence to procure: *Guinane v. Sunnyside*, 21 A. R. 49.

Notice of
expulsion.

Inasmuch as no notice was given to him of the charge preferred against plaintiff, upon which the defendants purported to act in expelling him, and therefore his expulsion was in those circumstances contrary to natural justice: *Gray v. Allison*, 25 T. L. R. 531.

Bicycle
cup.

Where a challenge cup to be won in a bicycle race between competing clubs, was held by trustees under an instrument of trust by which all arrangements pertaining to the course, race, protests, and matter "connected with the welfare of the cup" were to be decided by the trustees according to certain rules, the Court, upon the mere allegation of fraud and before decision of the trustees, refused to exercise jurisdiction restraining the trustees from parting with the cup to an alleged winner under protest, upon the ground that one of the winning riders did not go round the course, that being a matter of fact for the decision of the trustees: *Brown v. Overbury*, 11 Ex. 715; *Ellis v. Hopper*, 3 H. & N. 768, and *Newcomen v. Lynch*, Ir. R. 9 C. L. 1; Ir. R. 10 C. L. 248, followed: *Ross v. Orr*, 25 O. R. 595.

Rules of
club.

Where the rules of a club contain no express provision for the making of amendments or alterations therein, the majority of members assembled in general meeting have no inherent authority, against the wishes of the minority, to alter the rules forming the written contract by which the members are bound, and a dissentient member who has declined to pay an increased subscription, imposed at a general meeting, and who has been consequently posted as in default, will be entitled to an injunction to restrain the committee of the club from excluding him from its privileges: *Harington v. Sen-*

dall, 72 L. J. Ch. 360; (1903), 1 Ch. 921; 88 L. T. 323; 51 W. R. 463.

ALIENS.

R. S. C. c. 97, An Act respecting the Importation and Employment of Aliens, contains the following:—

2. All contracts or agreements, express or implied, parole or ^{Certain} special made by and between any person, company, partnership or ^{contracts} corporation, and any alien or foreigner, to perform labour or service, ^{with aliens} or having reference to the performance of labour or service by any ^{for ser-} person in Canada previous to the immigration or importation into Canada of the person whose labour or service is contracted for, shall be void and of no effect.

13. This Act shall apply only to the importation or immigration ^{Recipro-} of such persons as reside in or are citizens of such foreign countries ^{city of Act.} as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada of a character similar to this Act.

14. Evidence of any such law or ordinance of a foreign country ^{Evidence} may be given by the production of a copy thereof purporting to be:— ^{of foreign}

(a) Printed by the government printer, or at the government printing office of such foreign country, or contained in a volume of laws or ordinances of such country purporting to be so printed; or

(b) Certified to be true by some officer of state of such foreign country, who also certifies that he is the custodian of the original of such law or ordinance, in which case no proof shall be required of the handwriting or official position of the person so certifying.

ALTERATION.

Leading case, *Pigot's Case*, 11 Rep.

1. An immaterial alteration by a stranger does not avoid a deed.

2. If made by a party interested, the alteration will avoid as against him, whether material or not.

3. A material alteration by a stranger avoids it.

The second resolution in *Pigot's case* was dissented from in *Aldous v. Cornwall*, L. R. 3 Q. B. 573; and it is the rule that an alteration which has no effect on the liability of either party, as stated in the contract, will not vitiate the instrument. As to the third resolution, it has also been questioned. As to whether a material alteration by a stranger would avoid an instrument or not would depend on whether the plaintiff was responsible for the custody of the document: *Sayles v. Brown*, 28 Chy. 10; *Sommerville v. Rae*,

28 Chy. 618. The legal effect of a document cannot be altered by the subsequent conduct of the parties, but it is not unreasonable to look at that for an explanation of an ambiguous phrase: *Pollock on Contracts*, p. 431; *McCuaig v. Phillips*, 10 M. L. R. (Man.). A person who has executed a deed cannot be bound by an alternation made in his absence by his verbal direction. *Quere*, whether upon the evidence stated in the report of this case defendant could be held estopped by his acts from disputing the bond as altered: *Martin v. Hanning*, 26 U. C. R. 80.

In construing a deed the Court can correct a grammatical error which, if allowed to stand, would have the effect of nullifying the obvious intention of the grantor: *Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Co.*, 8 F. 915.

Although the subsequent acts of the parties to the contract are not admissible as evidence to vary its terms, they may prevent one of the parties from insisting upon a strict performance of the original agreement: *Bruner v. Moore*, 73 L. J. Ch. 377; (1904), 1 Ch. 305; 89 L. T. 738; 52 W. R. 295; 20 T. L. R. 125.

The customer of a bank who so draws a cheque that a forger is able to insert words and figures increasing the amount is not liable to the bank for the loss sustained in paying the increased amount: *Colonial Bank of Australasia v. Marshall*, 75 L. J. P. C. 76; (1906), A. C. 559; 95 L. T. 310; 22 T. L. R. 746.

AMBIGUITY.

The principle laid down in *Ireland v. Livingstone* (41 L. J. Q. B. 201; L. R. 5 H. L. 395), is not confined to cases between principal and agent, but is of wider application. Where a person makes a communication to another in ambiguous terms he cannot afterwards complain if the recipient of the communication *bona fide* puts upon it a meaning not intended by the sender: *Miles v. Haslehurst*, 12 Com. Cas. 83; 23 T. L. R. 142.

Where words in a proposal for a contract are understood and acted upon by the parties in different senses there is no contract, and it is for the plaintiff, in an action for breach of contract, to shew that his construction is the true one. It is not for the Court to determine the true construction: *Falck v. Williams*, 69 L. J. P. C. 17; (1900), A. C. 176.

APPROPRIATION OF PAYMENTS.

Appropriation of payments is to be made (1) as the debtor directs at the time of payment; (2) when there is no direction by the debtor, as the creditor directs; (3) when neither make any direction then the law will apply to the older debt, not statute barred, or as may be just: *Wilson v. Rykert*, 14 O. R. 188.

Where part of plaintiff's own demands, stated in his particulars, are barred by the statute, he has a right to place against these the items of set-off appearing in his particulars to be beyond six years: *Ford v. Spafford*, 8 U. C. R. 17.

When a debtor pays money on account to his creditor, and makes no appropriation to particular items, the creditor has the right of appropriation, and may exercise the right up to the last moment by action or otherwise. The application of the money is not governed by any rigid rule of law, but by the intention of the creditor expressed, implied or presumed: *Corey v. Owners* (1897), A. C. 286.

Absence of Appropriation by Principal.—A surety has no right to complain of the appropriation of payments by the creditor when the principal makes no appropriation of them, but leaves it to the creditor: *Cunningham v. Buchannan*, 10 Chy. 523.

Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold and crediting him with moneys received, and crediting and charging notes on accounts in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness: *Griffith v. Crocker*, 18 A. R. 370.

The rule that payments on account are to be appropriated to interest before principal does not apply, where in the case of bankers' accounts, the interest has, upon making up the account half-yearly, been converted into capital: *Parr's Banking Co. v. Yates*, 67 L. J. Q. B. 851; (1898), 2 Q. B. 460; 47 W. R. 42.

In the absence of notice of fraud a banker is entitled to set off what is due to a customer on one account against what is due from him on another, although the former may in fact belong to other persons: *Bank of New South Wales v. Goulburn Valley Butter Factory*, 71 L. J. P. C. 112; (1902), A. C. 543; 87 L. T. 88; 51 W. R. 367.

The rule in *Clayton's Case* (1 Mer 572), that where there is an account current between parties, and payments are made without appropriation by either debtor or creditor, such payments are to be attributed to the earliest items in the account, does not apply to a case in which debts arise from distinct transactions which are not brought into a common account, and where with respect to the items to which it is sought to appropriate the payments there has been only a temporary abandonment of a remedy *in rem*.

The principle of *Clayton's Case* cannot apply to two transactions of the same date: *The Mecca*, 66 L. J. P. 86; (1897), A. C. 286; 76 L. T. 579; 45 W. R. 667; 8 Asp. M. C. 266.

ASSIGNMENT.

One joint covenantee can, by virtue of the Mercantile Amendment Act, R. S. O. 1887, c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as p'aintiff. A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt: *Scarlett v. Nattress*, 23 A. R. 297.

Where a person having a demand against another gave to a creditor of his own an order on his debt for a portion of his demand, which order the debtor was notified of but did not accept: Held., notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which is covered: *Farquhar v. City of Toronto*, 12 Chy. 186.

A parol assignment of a chose in action is valid, notwithstanding section 7 of the Mercantile Amendment Act, R. S. O. 1887, c. 122: *Trusts Corporation of Ontario v. Rider*, 24 A. R. 157; affirming 27 O. R. 592.

Chose in Action.—Verbal assignment: *Shannon v. Toronto*, 15 C. L. T. 39.

Under s. 25, s.-s. 6 of the Judicature Act, 1873, there cannot be a valid assignment of a part of a debt or legal chose in action: *Skipper v. Holloway*, 79 L. J. K. B. 91, not followed. *Bowles v. Baker*, 102 L. T. 29; 26 T. L. R. 243.

Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in the assignor: *Okell v. Dickson*, 9 Brit. Col. L. R. 151.

To constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required, but any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient: *Hughes v. Chambers*, 14 Man. L. R. 163.

No writing or particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest being all that is required. *Hughes v. Chambers*, 14 Man. L. R. 163, approved: *Re McRae Estate*, 6 O. L. R. 238.

Parol Assignment.—A present appropriation by order of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity. A married woman, as agent of her husband, who was indebted for costs to a firm of solicitors, instructed one of the firm, after its dissolution, to sell

certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, in which one of the old firm was a member: Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an assignee under a written assignment of the same, subsequently made. Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of land when sold: *Heyd v. Miller*, 29 O. R. 735.

Conditional Assignment. — Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawee; still, if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid to return the order, and he subsequently proceeds against the drawer, in respect of such claim, he cannot afterwards enforce his equitable claim against the drawee: *Muir v. Waddell*, 14 Chy. 488.

It is no objection to an assignment in equity of a claim against a third person, that the work upon which the claim is to arise has yet to be performed: *Buntin v. Georgin*, 19 Chy. 167.

Where a non-negotiable chose in action is absolutely transferred by writing for value, and the transferee again absolutely assigns it for valuable consideration to another person, who takes it without notice, he obtains a valid title to it free from any latent equity between the original assignor and assignee. *In re Agra and Masterman's Bank*, L. R. 2 Ch. at p. 397, specially referred to: *Quebec Bank v. Taggart*, 27 O. R. 162.

The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master: Held, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action: *McCormack v. Toronto R. W. Co.*, 13 O. L. R. 656.

A debtor or trustee of a fund is not responsible to an assignee of the creditor or payee of the fund for dealing with the latter persons without reference to the assignment, unless it is found either that at the time of so dealing he actually knew of the assignee's title, or that he had previously received a notice sufficiently distinct to give him an intelligent apprehension of the fact that the assignee had acquired an interest in the claim or fund: *Crawford v. Canada Life Assurance Company*, 24 A. R. 643.

Where an assignment of a chose in action is made by way of security, the assignor retaining a beneficial interest, he may notwithstanding the assignment maintain an action in his own name to re-

cover the debt, the assignee being a proper but not a necessary party: *Prittie v. Connecticut Fire Ins. Co.*, 23 A. R. 449.

An assignee in order to obtain the benefit of 35 Vict. c. 12 (O.), must take the beneficial interest in the claim assigned. He cannot sue in his own name where the assignment has been made only in order to enable him to bring the action: *Wood v. McAlpine*, 1 A. R. 294.

Writs of execution only bind moneys, choses in action, or securities for money, from the time of seizure by the sheriff, and not from the time either of the issue of the writs or delivery thereof to the sheriff: *McDowell v. McDowell*, 10 L. J. 48.

Held, by the full Court, affirming the decision of Taylor, J., that an equitable assignment of a chose in action may be made by any words or acts shewing a clear intention to assign; a deed or writing is not necessary: *McMaster v. Canada Paper Co.*, 1309 M. L. R. (Man.)

Held, affirming the judgment appealed from (23 N. S. Rep. 50), that the notice was a sufficient compliance with the statute: *Grant v. Cameron*, 18 S. C. R. 716.

Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action: *Rennie v. Block*, 26 S. C. R. 356.

Chose in Action.—Since the Married Woman's Property Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it: *Sherrat v. Merchants Bank of Canada*, 21 A. R. 473.

See *McCabe v. Robertson*, 13 U. C. C. P. 471.

Under s. 25, s.-s. 6 of the Judicature Act, 1873, there cannot be a valid assignment of an unascertained part of a debt: *Jones v. Humphreys*, 71 L. J. K. B. 23; (1902), 1 K. B. 10; 85 L. T. 488; 50 W. R. 191

To constitute a good equitable assignment of a debt all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person, and if the debtor disregards such notice he does so at his peril: *Brandt v. Dunlop Rubber Co.*, 74 L. J. K. B. 898; (1905), A. C. 454; 93 L. T. 495; 11 Com. Cas. 1; 21 T. L. R. 710.

Where a person in possession of a fund has received notice of an assignment of his rights by one of several persons entitled to

charges on the fund, and nevertheless wrongfully makes payment out of the fund to the assignor, the rights *inter se* of the several persons entitled to the charges to what remains of the fund cannot in any way be effected by such payments: *Liquidation Purchase Estates Co. v. Willoughby*, 67 L. J. Ch. 251; (1898), A. C. 321; 78 L. T. 329.

Notice to a debtor who has given a negotiable instrument for his debt that the debt has been assigned by the creditor can be disregarded by the debtor, even if the creditor who has assigned the debt is the holder of the negotiable instrument: *Bence v. Shearman*, 67 L. J. Ch. 513; (1898), 2 Ch. 582; 78 L. T. 804; 47 W. R. 350.

The bailee of a chattel for hire is not, in the absence of want of due care on his part, liable to the bailor for the damage caused to the chattel by the tortious act of the bailee's servant whilst acting outside the scope of his employment: *Coupe Co. v. Maddick* (60 L. J. Q. B. 676; (1891), 2 Q. B. 413), considered and distinguished. *Sanderson v. Collins*, 73 L. J. K. B. 358; (1904), 1 K. B. 628; 90 L. T. 243; 52 W. R. 354; 20 T. L. R. 249.

BAILMENT.

Held, that the receipt and the facts in connection therewith constituted a bailment of the wheat and not a sale. *South Australian Ins. Co. v. Randall*, L. R. 3 C. P. 1011, distinguished: *Clark v. McClellan*, 23 O. R. 465.

In action against a stranger for loss of goods caused by his negligence, the bailee in possession of the goods can recover their value, although he would have had a good answer to an action by the bailor for the damages for the loss of the goods: *Claridge v. South Staffordshire Tramway Co.* (61 L. J. Q. B. 503; (1892), 1 Q. B. 422), overruled. *The Winkfield*, 71 L. J. P. 21; (1902), P. 42; 85 L. T. 668; 50 W. R. 246; 9 Asp. M. C. 259.

CHAMPERTY.

A charitable motive induced by sympathy with the religious views of another person the object of the charity is none the less such a charitable motive as comes within the recognized exceptions to the law against the maintenance forbidding one person to support that other in his lawsuit.

Sed quære, per Phillimore, J., whether the law against maintenance has any application to the cases involving questions of the custody of the person: *Holden v. Thompson*, 76 L. J. K. B. 889; (1907), 2 K. B. 489; 97 L. T. 138; 23 T. L. R. 529.

There is nothing illegal in a sale by one person to another of information, likely or supposed to be likely, to lead to the recovery

of property, and in an agreement to pay the person selling the information a share of the property if and when recovered. But if the seller of the information further contracts that he will himself recover or assist in recovering the property, and provide evidence by which it may be recovered, and will take his remuneration in the form of a share of the property when recovered, the agreement is champertous and void: *Wedgerfield v. De Bernardy*, 24 T. L. R. 497, affirmed, 25 T. L. R. 21 C. A.

CONTRIBUTION.

The principle of contribution among co-sureties does not rest on contract, but upon principles of equity which may be modified by extent to which each has engaged himself: *Ostrander v. Jarvis*, 13 O. W. R. 375.

The doctrine of contribution between joint covenants is based on a broad principle of equity, or, as it has sometimes been expressed, on an implied contract, and depends on the intention of the parties contracting. Evidence of such intention is admissible after the death of one of such covenants: *Bentinck, In re; Bentinck v. Bentinck*, 80 L. T. 71.

DEVOLUTION OF ESTATES ACT.

The present Statute respecting the devolution and distribution of estates is Ontario Statutes, 1910, Chapter 56. Under section 3 all real and personal property devolve to and become vested in the personal representative as trustee for the persons by law beneficially entitled subject to payment of debts. So far as such property is not disposed of by deed, will, contract, or other effectual disposition, it must be administered and distributed as personal property. By section 5, real property is to be administered as if it were personal property. By section 7 "heir" is equivalent as a matter of construction to "personal representative."

In addition to the enactments relating to Dower referred to on page 258, section 9 of the Devolution of Estates Act must be borne in mind. This section provides for an election by the widow.

Section 12 defines the interest which a widow shall have in the estate of her husband dying intestate.

Section 29 provides for the distribution of property of a married woman dying intestate. One-third of her estate goes to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto devolves as if her husband had predeceased her.

The rule for the distribution of a person dying intestate is set out in section 30 as follows:—

One-third to the wife of the intestate, and all the residue by equal portions among the children of the intestate, and such persons as legally represent such children in case any of them have died in his lifetime, and if there are no children, or any legal representative of them, then one-half of the personal property shall be allotted to the wife, and the residue thereof shall be distributed equally, to every of the next of kindred of the intestate who are of equal degrees, and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and the sisters of the intestate shall be deemed of equal degree; but there shall be no representations admitted among collaterals after brothers' and sisters' children, and if there is no wife, then all such personal property shall be distributed equally among the children, and if there is no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives and in no other manner.

The Devolution of Estates Act has not superseded but is to be read in conjunction with R. S. O. 1877, c. 106, ss. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burden, unless the will otherwise directed by such terms as distinctly and unmistakably refer to or describe the mortgage debts: *Mason v. Mason*, 13 O. R. 725.

Section 4 of the Devolution of Estates Act, R. S. O. 1887, c. 108, which gives the widow the right of election between her dower and a distributive share in her deceased husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands: *Toronto General Trusts Co. v. Quin*, 25 O. R. 250.

Under s. 6 of the Devolution of Estates Act, R. S. O. 1887, c. 108, where brothers or sisters are entitled to share of an intestacy, the children of a deceased brother or sister of the intestate are entitled to share per stirpes. *Re Colquhoun*, 26 O. R. 104, overruled: *Walker v. Allen*, 24 A. R. 336.

The effect of the Devolution of Estates Act and the amendments acted upon by the registration of a caution under an order of a County Judge after the twelve months had expired is to place lands of a testator again under the powers of his executors so that they can sell them to satisfy debts; and the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance; the operation of a devise of lands is by the Act only postponed for the purpose of administration; and the estate does not pass through the medium of the executors, but by the operation of the devise: *Ianson v. Clyde*, 31 O. R. 579.

Where a devise of real estate is made subject to the payment of an annuity, and the devisee accepts the devise, he will be deemed to

have assumed a personal liability to pay the amount which will be enforced by the Court: *Carter v. Carter*, 26 Chy. 232.

Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor. The Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors extending beyond the periods of vesting prescribed by these Acts: *In re Koch and Wideman*, 25 O. R. 262.

A testator, dying in 1895, gave his estate (subject to his wife's life interest) to his brothers and sisters, share and share alike. One brother was living in 1885, but had not been heard of for more than seven years before the death of the testator. There was no evidence that he was in fact dead, nor that he survived the testator. Letters of administration to his estate were granted in 1903, upon the presumption that he was dead: Held, that the onus of proof that he survived the testator lay upon those who claimed under him; and, there being no evidence that he survived, the administrator of his estate failed to establish any right to share in the testator's estate, and distribution among the other legatees or their representatives was ordered, subject to their undertaking to refund, should it be established at some future time that the absentee or his representative was entitled: *In re McNeil*, 12 O. L. R. 208.

Sections 14 and 15 of the Devolution of Estates Act, R. S. O. 1897, c. 127, as amended by 2 Edw. VII. c. 17, apply where the interests of infants as well as those of adults are to be affected; and where, upon an intestacy, land has vested in an adult and an infant (the heirs of the intestate), after three years from the death of the intestate, the land not having been disposed of or conveyed by the administrator and no caution having been registered under s. 14, after the expiry of that period, upon the certificate of the official guardian approving of and authorising the caution to be registered being given and registered with the caution, the effect under s. 15 is to re-vest land in the administrator, just as if it would have been or remained vested if the caution had been registered within the three years; and the administrator with the consent of the official guardian, acting on behalf of the infants, may then sell and convey as provided in s. 16: *Re Bowerman and Hunter*, 18 O. L. R. 122, 13 O. W. R. 891.

DONATIO MORTIS CAUSA.

A., shortly before his death, gave his wife a box containing certain things, under circumstances which would amount to a *donatio mortis causa* of the box and contents. In the box was a deposit receipt for £300, which A. had in the bank. Held, that this receipt being only evidence of a debt, and not a document that could have been transferred so as to make the bank liable to a third party, this

money did not pass to the wife as a *donatio mortis causa*. See *Aniss v. Witt*, 33 Beav. 619, that money due on a banker's deposit note passes as a *donatio mortis causa* by the delivery of the note: *Ex parte Gerow*, 5 All. 512 (N.B.).

To effect a *donatio mortis causa* delivery to a third person for the use of the donee is sufficient, provided that such third person is not a mere trustee, agent or servant of the donor. The assent of the donee, or even his knowledge of the delivery, is not requisite. Delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property, and transfers the possession of the dominion over the same: *Walker v. Foster*, 30 S. C. R. 299.

The money at the credit of a savings bank depositor may pass as a *donatio mortis causa* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book. Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causa*; that is any evidence which is believed and is corroborated as required by the statute may be acted upon: *In re Reid*, 6 O. L. R. 421.

The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, retired to his room and lay down on his bed, and while she was endeavouring to make him comfortable he handed her a small wallet containing three keys, and said: "All the money and notes I have got are yours." One of the keys was that of a trunk in his room, and another of a cash box (in which the money and notes were) in the trunk. There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant. She retained the keys until his death. In an action by the administrators of his estate for the money and notes: Held, that there was a good *donatio mortis causa*. *In re Mustapha; Mustapha v. Wedlake*. 5 Times L. R. 160, followed: *Charlton v. Brooke*, 5 O. L. R. 87.

To effect a *mortis causa donatio* it is not necessary that there should be a personal delivery to the donee, but the donation may be effected by delivery to a third party on behalf of the donee: *Hutchinson's Executrix v. Shearer* (1909), S. C. 15.

An I. O. U. cannot be the subject of a *donatio mortis causa*: *Duckworth v. Lee* (1899), 1 Ir. R. 405.

A cheque drawn by the donor and given but not resulting in payment, either actual or constructive, in the donor's lifetime, cannot be the subject of a valid *donatio mortis causa*: *Hewitt v. Kaye* (37 L. J. Ch. 633; L. R. 6 Eq. 198), and *Beak's Estate*. *In re*

Beak v. Beak (41 L. J. Ch. 470; L. R. 13 Eq. 489), followed. *Bromley v. Brunton* (37 L. J. Ch. 902; L. R. 6 Eq. 275), explained. *Beaumont, In re*; *Beaumont v. Ewbank*, 71 L. J. Ch. 478; (1902), 1 Ch. 889; 86 L. T. 410; 50 W. R. 389.

DUPLICATE INCORRECT.

When a written instrument is made in duplicate, all that one contains more than the other is non-existent so far as the holder of the latter is concerned. In order that secondary evidence may be admitted of a document it is not necessary to shew that it was lost by no fault of the party or unforeseen accident; it is sufficient to shew to the satisfaction of the Court that it is impossible to find it, and that it has not been purposely destroyed: *Lefrance v. Larochelle*, Q. R. 27 S. C. 153.

DURESS.

Absence of Duress.—The fact of a payment having been made under protest, but without duress, or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money: *Doe d. Morgan v. Boyer*, 9 U. C. R. 318.

See *St. Thomas v. Yearsley*, 22 A. R. 340. Where duress is alleged it must be manifested that force preponderated throughout, so as to disable the one interested from acting as a free agent: *Lawless v. Chamberlain*, 18 O. R. 296.

FORBEARANCE TO SUE.

Ever since *Callister v. Bischoffstein*, L. R. 7, Q. B. 419, at least it has been the law that "if a man believes *bona fide* he has a fair chance of success he has a reasonable ground for suing and his forbearance to sue will constitute a good consideration." In *Ex. p. Banner*, 17 Q. B. D. 480, some doubt seems to have been cast upon this principle (see p. 490), but this doubt is in turn spoken of with disapproval by the Court of Appeal in *Miles v. New Zealand, etc., Co.*, 32 Ch. D. 266; and there can be no doubt that the law is as stated by Cockburn, C.J.: *Drewry v. Percival*, 1 O. W. N. 72.

FOREIGN LAW. See also p. 62, ante.

The defences that may be set up in an action in Manitoba on a foreign judgment by virtue of s.-s. 1 of s. 38 of the King's Bench Act, R. S. M. 1902, c. 40, are not limited to such as might have been, but were not, pleaded in the original action, but include such as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay; and a motion to strike out defences was refused. *Gault v. McNabb*,

1 Man. L. R. 35, distinguished. *Meyers v. Prittie*, 1 Man. L. R. 27, not followed. *British Linen Co. v. McEwan*, 8 Man. L. R. 99, discussed: *Hickey v. Legrosley*, 15 Man. L. R. 304.

Parties to a contract are presumed to adopt the law of the place where it is made as governing the nature of the obligations that spring from it and the incidents which arise in the course of its developments: *German Savings Bank v. Tetrault*, Q. R. 27 S. C. 447.

A stipulation or covenant in a contract that it shall be governed by the laws of a foreign country is valid and binding. Under the law of England, a stipulation in a charterparty that the owner or charterer of the vessel shall not be liable for damages to the goods carried, caused by improper and even negligent stowage, is valid and binding: *Canada Sugar Refining Co. v. Furness-Withy Co.*, *Tellier v. Furness-Withy Co.*, *Dobell v. Furness-Withy Co.*, Q. R. 27, S. C. 502.

In an action brought in a County Court in the Province of Ontario upon a judgment recovered in a Circuit Court in the Province of Quebec, against an incorporated company, who, at the time the Quebec action was begun, had no office or agent in the Province of Quebec: Held, that the Act of the Legislature of the Province of Canada, 22 Vict. ch. 5, sec. 58, is not now in force, and *Court v. Scott* (1881), 32 U. C. C. P. 148, is no longer applicable; the binding effect of the judgment sued on depended upon the rules of international law, and the defendant company not having been domiciled or resident in Quebec when served with the writ of summons, the judgment there obtained must be treated in the Courts of Ontario as a nullity.

Vezina v. Will. H. Newsome Co., 14 O. L. R. 658.

Codd v. Delap, 92 L. T., followed. There is no conflict between the above decision and the judgment of the Court of Appeal in *Woodruff v. MacLennan*, 14 A. R. 242, as that case turned upon a different state of facts and did not call in question the principle of the decision of the English Court of Appeal in *Abouloff v. Oppenheimer*, 10 Q. B. D. 295. *Trimble v. Hill*, 5 App. Cas. 342, referred to: *Jacobs v. Beaver Silver Cobalt Mining Co.*, 17 O. L. R. 496, 12 O. W. R. 803.

FORGERY.

In an action to set aside a bill of sale of a mineral claim on the ground that it was forged by one of the defendants, evidence was given by the plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence witnesses were allowed to

give evidence shewing that the plaintiff and his witnesses in respect of the same mineral claim had been parties or privy to a fraudulent transaction involving perjury and conspiracy, and tending to show that a like fraudulent scheme was being attempted in this case, and the result was that the Judge was so influenced by this evidence that he gave judgment for the defendants:—Held, that the evidence on behalf of the defendants was properly admitted: *D'Avignon v. Jones*, 32 S. C. R. 650.

FRAUD.

See ACTION FOR DECEIT, *ante* page 394, and ACTION FOR FRAUDULENT PREFERENCE, *ante* page 398.

Proof of fraud.

In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false: *Derry v. Peek*, 14 A. C. 374; *Angus v. Clifford*, (1891) 2 Ch. 463.

To go to jury.

Whatever be the form of the contract, the party who makes an allegation of fraud is entitled to have the question submitted to the jury: *Pearson v. Dublin Corporation*, 77 L. J. P. C. 1; (1907) A. C. 351, II. L. (Ir.).

Interest on money obtained by fraud.

Money obtained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law. But the fraud must be proved in the proceedings by which the money is recovered, otherwise no interest will be allowed; and it is not sufficient that the fraud has been proved in other proceedings in a criminal Court: *Johnson v. Regem*, 73 L. J. P. C. 113; (1904) A. C. 817; 91 L. T. 196; 51 W. R. 131.

Where a person has been induced to sign a promissory note by a fraudulent representation that he is witnessing a deed, and at the time he signs it he believes he is witnessing a deed, and has no knowledge of the existence of a promissory note, and the jury negative negligence upon his part in so signing the document, he is not estopped in an action brought against him upon the note by the payee of the note from relying upon the true facts as a defence, and such facts afford an answer to the action: *Lewis v. Clay*, 67 L. J. Q. B. 224, 77 L. T. 653, 46 W. R. 319.

Damages.

The only damages recoverable in an action of deceit based upon false representations inducing the plaintiff to purchase property, are the difference between the price paid for the thing purchased and its real value, and when the plaintiff has sold the property at a profit, he can recover no damages, although he has failed to realize the profit he could reasonably have expected if the representations had been

true: *Peck v. Derry*, 37 Ch. D. 541, 14 App. Cas. 337; *McConnel v. Wright* (1903), 1 Ch. 546, and *Steele v. Pritchard*, 17 Man. L. R. 226, 7 W. L. R. 108, followed. *Rosen v. Lindsay*, 5 W. L. R. 546; 7 W. L. R. 115, Man. L. R. 251.

In considering whether a conveyance is fraudulent and void within the statute 13 Eliz. c. 5, the Court must look at the whole of the circumstances surrounding the execution of the conveyance and see whether it was in fact executed with the intent to defeat and delay creditors: *Holland In re, Gregg v. Holland*, 71 L. J. Ch. 518, (1902) 2 Ch. 360, 86 L. T. 542, 50 W. R. 575, 9 Manson 259.

Although the object with which a conveyance of property is placed in the name of another may be to protect it against the creditors of the actual purchaser, yet the property belongs to the purchaser: *Gibbons v. Tomlinson*, 21 O. R. 489.

A creditor for an amount under \$40 cannot attack a conveyance of land as voluntary or fraudulent: *Zilliax v. Deans*, 20 O. R. 539.

The right of a person defrauded under the Statutes of Elizabeth to elect to avoid a deed as fraudulent, may be lost in either of the following ways:

1. It may be lost by the deed having become for value by a consideration *ex post facto* before any steps are taken by that person to impeach it.

2. The voluntary grantee may have divested himself of the property by a *bona fide* transfer of it for value to a *bona fide* purchaser for value without notice of fraud.

The case of *Masuret v. Stewart*, 22 O. R. 290, on doctrine of following the proceeds, distinguished: *Tennant v. Gallow*, 25 O. R. 61.

FRAUDS, STATUTE OF.*

See also ACTION ON SALE OF REAL PROPERTY, p. 201; ACTION ON GUARANTEE, p. 248; ACTIONS RELATING TO SALE OF GOODS, p. 270.

See also CONTRACTS BY CORRESPONDENCE, page 537, *post*.

The authority of an auctioneer upon a sale by auction of real estate to sign a memorandum of the contract as agent for the purchaser, does not extend to the auctioneer's clerk. Such a memorandum in order to bind the purchaser by the auctioneer himself, and at the time of sale unless the purchaser has by sign, word or other-

* For convenience of reference sections 4, 7, 9 and 16 of the Statute of Frauds are printed as they appear in Vol. III. of the Revised Statutes of Ontario, 1897:—

5. No action shall be brought whereby to charge any executor or administrator, upon any special promise to answer damages out of his

wise authorized the clerk to sign as his agent: *Bell v. Balls* (1897), 1 Ch. 663.

Where at a sale the highest bidder for a lot gave his name and address to the auctioneer's clerk, and followed him to the table, where the clerk filled in the blank in the printed memorandum with L.'s name and address, but L. refused to sign the memorandum, and ultimately refused to complete the sale: Held, binding on L.: *Sims v. Landry* (1894), 2 Ch. 318.

Agent purchasing.

Where an agent appointed by parol to purchase, purchased in his own name with his own name, and took the conveyance to himself and denied the agency: Held, that section 7 of the Statute of Frauds was a good defence: *James v. Smith* (1891), 1 Ch. 384.

Oral extension of tenancy.

Where a house was let on an oral tenancy, and there was an oral agreement to extend the tenancy beyond the year: Held, that the oral agreement was invalid under the Statute of Frauds, there being no other demise: *Sidebotham v. Holland, C. A.* (1895), 1 Q. B. 378.

Possession taken.

Possession taken before but continued after a parol contract for a lease, may, if unequivocally referable to the contract, constitute part

No action against executors, etc., upon a special promise; or upon any agreement or contract for sale of lands, etc., unless agreement, etc., be in writing and signed.

Declarations or creations of trusts of land to be in writing signed.

Assignments of trusts shall be in writing.

In what cases only contracts for sales of goods for \$40 or more to be in writing.

own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized. 29 Car. 2, c. 3, s. 4.

6. All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. 29 Car. 2, c. 3, s. 7.

8. All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect. 29 Car. 2, c. 3, s. 9.

12. No contract for the sale of any goods, wares or merchandise for the price of forty dollars, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised. 29 Car. 2, c. 3, s. 16.

of the performance, taking the case out of the Statute of Frauds: *Hodson v. Heuland* (1896), 2 Ch. 428.

A devise of rent to an attesting witness is void under 25 Geo. II. c. 6, s. 1. Rent issuing out of land is a tenement, it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1: *Hopkins v. Hopkins*, 3 O. R. 223.

A delivery of goods by a vendor to a common carrier without any specific direction or authority from the vendee will not amount to an acceptance by the latter within the Statute of Frauds: *Daley v. Marks*, Ber. (524) 346 (N.B.).

A contract not in writing entered into on the 26th May for the supply of a regiment with groceries for a year from the 1st June following, subject to be sooner determined in case the regiment should leave the Province, is void under the Statute of Frauds: *Reid v. Harding*, 2 Han. 137 (N.B.). An agreement for the sale of land good under the Statute of Frauds may be rescinded before breach of it by parol, provided there is a total abandonment of the whole contract and not merely a partial waiver of some of its terms; nor does the validity of such rescission depend on the existence of a consideration: *Barclay v. Proas*, R. E. D. 317 (N.S.). A sale of goods by a sheriff or his bailiff under execution is within s. 17 of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing in the same manner as an auctioneer or his clerk: *Flintoft v. Elmore*, 18 C. P. 274. A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo., under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. Judgment appealed from (22 Ont. App. R. 468) affirmed: *Martin v. Haubner*, 26 S. C. R. 142. A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. Judgment appealed from (6 B. C. Rep. 260) affirmed. Gwynne and Sedgewick, JJ., dissenting: *Archibald v. Mcverhanie*, 29 S. C. R. 564. Where payment is to be a condition precedent or a concurrent act, and is to be made in a certain manner, the plaintiff must aver a readiness to pay in the precise manner stipulated: *Tanner v. D'Eeverardo*, 3 U. C. R. 154. The position of a defendant resisting a claim is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds: *Laurence v. Errington*, 21 Chy. 261. An antenuptial contract not signed by the parties, but by notaries in their own names, they having full authority to do so, was held sufficiently signed within the Statute of Frauds: *Taillifer v. Taillifer*, 21 O. R. 337. An agreement to provide the plaintiff with board and lodging during the term of his natural life: Held, not

Devise of rent.

Delivery to carrier.

Supplying regiment with goods

Rescission.

Sheriff's power to sign.

Writing evidence, though repudiation.

Partnership.

Payment condition precedent

Defendant favoured.

Antenuptial contract.

- Board of life. within the statute, as it would not necessarily endure beyond a year: *Slater v. Smith*, 10 U. C. R. 630. The Court will enforce a verbal agreement, although it is to do an Act which is not to be performed within a year from the time of making the agreement, where the consideration therefor has been executed: *Halleran v. Moon*, 28 Chy. 319.
- Hiring. Held, that a contract for hiring for a year or more, defeasible within the year, is within s. 4 of the Statute of Frauds: *Booth v. Prittie*, 6 A. R. 680. To an action for a breach of promise of marriage, the plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August:" Held, that this was not an agreement not to be performed within a year, and was therefore not void under the statute although not in writing: *Smith v. Jamieson*, 17 O. R. 626. Where an agreement contains the names of the two contracting parties, the subject matter of the contract and the promise, it is binding on the party signing it, although not signed by the other party: *Bank of British North America v. Simpson*, 24 U. C. C. P. 354. An acceptance in writing by the owner of land of a written offer therefor addressed to him, but unsigned by any purchaser, and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer: *McIntosh v. Moynihan*, 18 A. R. 237.
- Breach of promise of marriage.
- Unilateral contract.
- Acceptance of unsigned offer.
- Contract not to be performed within a year. Contract not to be performed within a year: *Wier v. Letson*, 3 R. & Co. 299 (N.S.) The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making, so as to prevent an action being brought for the non-performance on the other side. And therefore, where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant, under which the latter was to deliver double the number to the plaintiff at the expiration of three years: Held, that the contract was not within the statute: *Trimble v. Lanktree*, 25 O. R. 109. A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods and chattels, and not a contract for work and labour and materials, and is within the Statute of Frauds: *Canada Bank Note Co. v. Toronto R. W. Co.*, 22 A. R. 462. The plaintiff on the 29th July agreed with defendants verbally to enter their service as book-keeper on the 1st September following for a year from that date: Held, a contract not to be performed within a year from the making thereof: *Dickson v. Jacques*, 31 U. C. R. 141. As a general rule a contract for the sale of standing timber, which is not to be severed immediately, is a sale of an interest in land: *Handy v. Carruthers*, 25 O. R. 279.
- Printing debentures.
- Sale of timber.

The construction of a mercantile contract is for the Court unless it contains words of a technical or conventional use in the trade to which the contract relates: *Nordheimer v. Robinson*, 2 A. R. 305.

The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract, and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as and is supposed by the contractor to be the engineer of a third person: *Good v. Toronto, Hamilton and Buffalo R. W. Co.*, 26 A. R. 133. Affirmed, 30 S. C. R. 114, *sub nom. Dominion Construction Co. v. Good*.

Postponing Performance.—While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it postponing the period for performance, and the original consideration will be regarded as imported into such new agreement and will support it: *O'Donell v. Hugill*, 11 U. C. R. 411.

A contract to grant a lease of a furnished flat is a contract concerning an interest in land within section 4 of the Statute of Frauds, and part payment of rent is not, unless possession is taken by the tenant, such a performance as to take the case out of the operation of the section: *Thursby v. Eccles*, 70 L. J. Q. B. 91; 49 W. R. 81.

Where a tenant in possession agrees verbally with his landlord for a further tenancy at an increased rent and remains in possession and pays the increased rent, that is sufficient part performance of the contract to prevent the application of the Statute of Frauds in an action for special performance. So held on the authority of *Nunn v. Fabian* (35 L. J. Ch. 140; L. R. 1 Ch. 35); *Miller & Aldworth v. Sharpe*, 68 L. J. Ch. 322; (1899) 1 Ch. 622; 80 L. T. 77; 47 W. R. 268.

A contract in writing for the sale of goods is not complete, under sec. 17 of the Statute of Frauds, where, although the price is stated in it, the contract shews upon its face that the time for payment is left to be settled by further negotiations as to which there has been no agreement; and the fact that possession of the goods is taken under the terms of the agreement does not affect the rights of the parties: *House v. Brown*, 14 O. L. R. 500.

A contract for the sale of goods to the plaintiffs at a certain price payable in Toronto was made by defendant at Chicago, through his agent there, the goods to be shipped by the Grand Trunk Railway from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that section 17 of the Statute of Frauds was not in force in Illinois: Held, that the

- contract being valid where it was made could be enforced here, though not in writing: *Green v. Lewis*, 26 U. C. R. 618. One W. Tombstone. during her lifetime orally ordered from the plaintiffs a tombstone to be put by them at the grave of her late husband. It was begun before and completed by them after her death, and they sued the administrator of her estate for the price. Held, that the plaintiff's claim was for the sale of a chattel, not one for work and labour, and there being no contract within the statute the plaintiffs could not recover. *Lee v. Griffin*, 1 B. & S. 272, followed: *Wolfenden v. Wilson*, 33 U. C. R. 442. There may be an acceptance of goods so as to take the case out of the statute and let in proof of the parol bargain, leaving the persons still able to object that the goods do not answer the contract: *McMaster v. Goddon*, 20 U. C. C. P. 16. Effect of acceptance Where an offer signed by the defendant to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum: Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance. Held, also, that an acceptance of an offer beneath the defendant's signature signed by the plaintiff's assignor did not cure the defect: *White v. Tomlinson*, 19 O. R. 513.
- Extrinsic parol evidence.
- Contract performed on one side The statute does not apply to a contract which has been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side: *Trimble v. Lanktree*, 25 O. R. 109.
- A verbal contract for "service, under which the defendant was to receive \$700 a year, to be increased per year until it reached \$1,000," is a contract not to be performed within a year, and is within the provisions of the Statute of Frauds: *Fairgrieve v. O'Mullin*, 40 N. S. R. 215.
- Auctioneer selling goods. An auctioneer may maintain an action in his own name for goods sold by him at auction; and an entry by his clerk who attended the sale in the sale-book is a sufficient memorandum of the contract within the Statute of Frauds: *Coate v. Terry*, 24 U. C. C. P. 571.
- Bailiff's sale. A sale of goods by a sheriff or his bailiff under execution is within s. 17 of the Statute of Frauds, and either of them may sign for the purchaser of the memorandum in writing in the same manner as an auctioneer or his clerk. The entry of defendant's agent as the purchaser is sufficient if the defendant afterwards acknowledge the agent's authority, as was done in this case: *Flintoff v. Elmore*, 18 U. C. C. P. 274.
- Delivery to carrier. Although delivery to a carrier is *prima facie* an appropriation of the goods yet the seller may contract to deliver them to the buyer

at their destination, in which case the property does not pass until such delivery: *Badische v. Basle* (1898), A. C. 20.

Held, that contract for hiring for a year or more is defeasible within the year, and within section 4 of the Statute of Frauds: *Booth v. Prittie*, 6 A. R. 680. For year or more.

An offer by a purchaser at auction to sell to another person the goods purchased by him does not constitute an acceptance of them to take the case out of the Statute of Frauds: *Clarkson v. Noble*, another. 2 U. C. R. 361. Offer by purchaser to sell to another.

Treating the action as one for specific performance of a contract, it must fail against the wife the owner of the land; there was no contract with her; the Statute of Frauds was as to her a good defence; for the deed signed by her merely to bar her dower, was not intended by her to authenticate any contract for the sale by her of land to the plaintiff; and there was no part performance by her. *Lacroix v. Longtin*, 22 O. R. 506. Agreement by husband to convey wife's land.

In an action against a Limited Company, plaintiff's having no notice of by-law restricting authority of president of company: Held, that the signature of the president was sufficient under the Statute of Frauds to bind the company: *Standard Bank v. Thomas Limited*, 1 O. W. N. 548.* Action against company.

CONTRACT BY CORRESPONDENCE.

See also *ante* page 205 under Contracts for Sale of Land, and preceding paragraphs page 531 *et seq.*

Where it is sought to establish a contract from a correspondence, the whole of the correspondence which has taken place between the parties must be taken into consideration; accordingly where a letter written by plaintiff to defendant and replied to by the latter made a complete contract, but before the contract was performed, or there was any breach, other letters passed between the parties, from which it appeared that both parties still treated the matter as being in negotiation: Held, that there was no binding contract: *Jones v. De Wolf*, Vol. 23, 356 (N.B.). Where a Court has to find a contract in a cor-

* If in the course of a case it is intended to suggest that witness is not speaking the truth upon a particular point, his attention must be directed to the fact in cross-examination showing that that imputation is intended to be made so that he may have the opportunity of making any explanation which is open to him unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or the story is of an incredible or romancing character: *Browne v. Dunn* (1893), 6 R. 67. Action on sale of goods. Absence of cross-examination.

respondence and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration: *Hussey v. Horne-Payne* (4 App. Cas. 311), *North-West Transportation Co. v. McKenzie*, 25 S. C. R. 38. Where a contract is to be made out from letters and telegrams, it is not essential that each should refer in terms to the preceding one, but the connection may be made out even from the subject-matter of the correspondence so long as it appear that all relate to the same contract: *Ballantyne v. Watson*, 30 C. P. 529. In the construction of a contract arising out of letters and telegraphic communications, the party making the proposal must be considered as renewing his offer every moment until the time at which the answer is to be sent and then the contract is completed by the acceptance of the offer: *Thorne v. Barwick*, 16 U. C. C. P. 369. In the construction of a contract by letters, it is not necessary that there should be an express assent, but the requisite assent may be collected by implication from the whole terms of the correspondence: *Bruce v. Tolton*, 4 A. R. 144.

A contract by correspondence is made at the place where the acceptance is sent by letter or telegram to the party making the offer: *Schmidt v. Crowe*, 5 Q. P. R. 361.

Offer without Prejudice.—A letter containing an offer written “without prejudice,” means “I make you an offer; if you do not accept it this letter is not to be used against me,” but when the offer is accepted the privilege is removed: *Omnium Securities Co. v. Richardson*, 7 L. R. 182.

To a written offer to sell some flour on certain terms, the following telegram was sent:—“Letter received, offer accepted, writing.” No letter was written:—Held, that there was a completed contract: *Dalrymple v. Scott*, 19 A. R. 477.

When a proposal is made in writing by one party and accepted *ad idem* by the other, either verbally or by acting upon it, the contract is a written one: *Ellis v. Abell*, 10 A. R. 226.

Letter signed by purchaser on paper on which vendor's name and address printed, held that the printed heading formed no part of the letter. The object of such a heading is to give information as to the place to which any reply is to be given: *Hucklesby v. Hook* (1900), 82 L. T. 117.

An envelope and a letter, which is shown by evidence to have been enclosed in it, are so connected together that the envelope may be used to supply the name of one of the parties to a memorandum in writing of a contract within section 4 of the Statute of Frauds: *Pearce v. Gardner*, C. A. (1897), 1 Q. B. 688.

As a written memorandum of an oral guarantee is required only for the purpose of evidence, a letter or other writing subsequently given by the guarantor sufficiently shewing the terms of his undertaking will suffice. A letter shewing the terms written by the guar-

antor, partly on his own behalf and partly on behalf of a firm of debtors, and signed by him in the firm name and in his own name for them per proc., is sufficient to bind him: *Thomson v. Eede*, 22 A. R. 105.

A letter referring to the terms of a contract made by an agent, but denying the authority of the agent to make it, is a sufficient memorandum within the Statute of Frauds: *Haubner v. Martin*, 22 A. R. 468, 26 S. C. R. 142.

The acceptance of an offer must be expressed not implied. *Harvey v. Facey* (1893), A. C., followed: *Little v. Hanbury*, 14 B. C. R. 18; 9 W. L. R. 115. See *Central Vermont v. Dube*, Q. R. 35 S. C. 180; *Sumner v. Cole*, 30 S. C. R. 379; *Keating v. Dillon*, Q. R. 28 S. C. 323. In negotiations carried on by correspondence it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but the mailing in general post office of such letter completes the contract, subject to revocation of the offer by the party making it before receipt by him of such letter of acceptance: *Magann v. Auger*, 31 S. C. R. 186.

Although it is settled law that an offer is to be deemed accepted when the letter containing the acceptance is posted, yet a town postman is not an agent of the Post Office to receive letters: *London and Northern Bank, In re; Jones ex parte*, 69 L. J. Ch. 220; 81 L. T. 512.

A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here (at Windsor) by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final." Held, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber, and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the parties: *Thomson v. Matheson*, 30 S. C. R. 357.

A contract by letters completed at place where letters arrived: *Watterson v. Beaudoin*, 11 Que. P. R. 86.

A contract by telegram is made at the place where the telegram of acceptance is sent from: *Melady v. Jenkins*, 18 O. L. R. 251.

A letter in which the writer promises to "favourably consider an application" for the renewal of a subsisting contract, "if we are satisfied with you as a customer," does not constitute a contract or agreement susceptible of legal enforcement: *Montreal Gas Co. v. Vasey*, 69 L. J. P. C. 134; (1900) A. C. 595; 83 L. T. 233.

GIFT OF CHATTEL.

Actual delivery of the thing is a necessary ingredient of a valid parol gift, or, in other words, a gift is a transaction consisting of two contemporaneous acts, the giving and the acceptance, and these acts cannot be completed without an actual delivery of the subject of the gift. *Irons v. Smallpiece*, 2 B. & Ald. 551, *Cochrane v. Moore*, 25 Q. B. D. 57, and *Re Bolin*, 136 N. Y. at p. 180, followed: *Hardy v. Atkinson*, 18 Man. L. R. 351, 9 W. L. R. 564.

An imperfect gift of personality by a donor who dies shortly afterwards will be made effectual by the appointment of the donee to be the donor's executor, even if he is only one of several executors. The rule laid down in *Strong v. Bird* (43 L. J. Ch. 814; L. R. 18 Eq. 315) applies not only to cases of release of debt, but also in cases of imperfect gift. *Strong v. Bird* (*supra*), followed: *Stewart, In re*; *Stewart v. McLaughlin*, 77 L. J. Ch. 525; (1908) 2 Ch. 251; 99 L. T. 106; 24 T. L. R. 679.

ILLEGALITY.

Ex turpi causa non oritur actio.—The plaintiff, a bookmaker, placed £107 6s. 8d., the proceeds of street betting, in a house occupied by a person who assisted him in his betting transactions. The house in question having been searched by the police under warrant issued under s. 11 of the Betting Act, 1853, the £107 6s. 8d. and a number of betting slips were seized and retained by the police for the purposes of certain proceedings taken against the plaintiff and others. In those proceedings the plaintiff was acquitted, and he now sued the defendant for detaining the £107 6s. 8d.:—Held, that the action was based upon an illegal transaction, and therefore was not maintainable: *Gordon v. Metropolitan Police Commissioner*, 54 S. J. 288, 26 T. L. R. 274.

Any use of property, which would be legal if due to a proper motive, can become illegal if it is prompted by a motive which is improper or even malicious: *Bradford v. Pickles* (1895), A. C. 587.

Test for
in pari
delicto.

Where a contract is illegal or immoral it cannot be enforced. The maxim of *in pari delicto potior est conditio defendentis* is important in considering the question of illegality. The test for determining whether or not the plaintiff and defendant were *in pari delicto* is by considering whether plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was a party: *Taylor v. Chester*, L. R. 4 Q. B. 309. In an action for work and labor the illegality of the transaction will be a defence. A party will not be permitted to recover either for work and labor done or materials provided where the whole combined forms

one entire subject-matter made in violation of the provisions of an Act of Parliament: *Bensley v. Bignold*, 5 B. & A. 335. A contract which amounts to maintenance is illegal, and cannot be enforced: *Bradlaugh v. Neudegate*, 11 Q. B. D. 1. In order that a deed operating under the Statute of Uses should be void either under the Statute of Maintenance or by force of the common law in affirmance of which the statute was passed, it is essential that the grantor be disseized. The Crown cannot be disseized: *Webb v. Marsh*, 22 S. C. R. at p. 441. No action lies for goods knowingly sold for illegal purposes. An agreement not to prosecute for a criminal offence is illegal; but, unless given in pursuance of such an agreement, securities given to a creditor by a debtor whose debt has been contracted under such circumstances that might have rendered him liable to a prosecution, may be enforced: *Flower v. Sadler*, 10 Q. B. D. 572; *Davis v. Hewitt*, 9 O. R. 435; *Summerfeldt v. Worts*, 12 O. R. 48.

R. S. O., 1897, c. 246, "An Act to Prevent the Profanation of Lord's the Lord's Day," prevents sales or ordinary work on Sunday. By Day Act. section 9 all sales and agreements made on Sunday are void. The English Act on the same point is 29 Charles II., c. 7. A farmer does not come within the provisions of this statute: a "farmer" is made subject to the provisions of R. S. O. c. 246: see *Crosson v. Bigley*, 12 A. R. 94. A cab-driver is not included in the Act: *Reg. v. Somers*, 24 O. R. 244. Injunction refused applied for to restrain a street railway company from operating their road on Sunday: *Atty.-Gen. v. Niagara Falls, etc., Co.*, 18 A. R. 453. Day of performance of a contract falling on Sunday, effect considered: *Udney v. Giles*, 20 O. R. 500.

Held, that the words "or other persons whatsoever" are applicable only to persons who are *ejusdem generis* with those specifically named, and do not include a farmer engaged in farm work: *Hamren v. Mott*, 5 Terr. L. R. 400.

All contracts in restraint of trade are bad, unless they are natural and not unreasonable for the protection of the parties in dealing Restrained of trade. legally with some subject of contract: see *Mitchell v. Reynolds*, 1 Sm. L. C.; *Wicher v. Darling*, 9 O. R. 311; *Schrader v. Lillis*, 10 O. R. 358; *Turner v. Burns*, 24 O. R. 28; *Cook v. Shaw*, 25 O. R. 124.

Where a covenant in restraint of trade is general, that is, without qualification, it is paid as being unreasonable and contrary to public policy. Where the covenant is partial, that is qualified, either as to time or space, then the question arises whether it is reasonable or not.

Whether the covenant is unreasonable, depends on whether the restraint is or is not greater than can possibly be required for the protection of the covenantee. Where a covenant is limited as to time, the burden lies on the covenantor of showing that the restraint is unreasonable: *Badische Anin v. Schott* (1892), 3 Ch. 447. Barden of proof.

The defendant sold to the plaintiff the good will of the business of an innkeeper, which he was carrying on in London, in this province:—Held, that a covenant in the agreement that the vendor should pay \$4,000 in the event of his carrying on business as an innkeeper within ten years, was void as an undue restraint of trade: *Mossop v. Mason*, 18 Chy. 453.

On the purchase of a manufacturing business by the plaintiff from the defendants, the latter entered into a covenant with the plaintiff which was part of the terms of sale, that they would not engage directly or indirectly in the manufacture or sale of "bamboo ware and fancy furniture, either as principal, agent, or employee, at any place in the Dominion of Canada for the term of ten years from the date hereof." "This clause does not prevent" defendants "from engaging in the retail business of furniture and bamboo ware selling. It covers wholesale or jobbing business:—Held, that as the restraint of trade was partial only, being confined to manufacturing certain articles and to selling them by wholesale or by jobbing, and for a limited time, and as there was no evidence on which it could be held to be unreasonable, and the interests of the public were not interfered with, the agreement was not contrary to public policy: *Cook v. Shaw*, 25 O. R. 124.

A party to a contract who alleges fraud cannot avoid one part of the contract and affirm another, unless the parts are severable as to form independent contracts. Restraint of trade and therefore void at law is a question of law for the determination of the Court: *United Shoe Manufacturing Co. v. Brunet*, 78 L. J. P. C. 101; (1909) A. C. 330; 100 L. T. 579; 53 S. J. 396; 25 T. L. R. 442.

The rule of law, that all covenants in restraint of trade, or binding an individual not to earn his living in the best way he can, are *prima facie* contrary to public policy and void, has not been rescinded by recent decisions; and, in considering the reasonableness of such a covenant for the protection of the business of the covenantee, the question must be taken into account whether the particular covenant is such as to be calculated to injure the public, the interest of the public in maintaining fair dealings between man and man not being sufficient to counterbalance the disadvantage to the public in enforcing a covenant which the covenantor ought to have been required to enter into. The principles laid down in *Nordenfelt v. Maxim Nordenfelt Gun and Ammunition Co.* (83 L. J. Ch. 908; (1894) 6 A. C. 535) and *Dubowski v. Goldstein* (65 L. J. Q. B. 397; (1896) 1 Q. B. 478) applied. *Ward v. Byrne* (9 L. J. Ex. 14; 5 M. & W. 548) distinguished: *Underwood v. Barker*, 68 L. J. Ch. 201; (1898) 1 Ch. 300; 80 L. T. 306; 47 W. R. 347.

So long as a covenant in restraint of trade is not more than is necessary for the protection of the covenantee the covenant is

not unreasonable and must be enforced; *Dottridge v. Cook*, 23 T. L. R. 644.

The question whether a contract in restraint of trade is reason- Question
able is a question of law for the Judge, and is not a question of of law.
fact for the jury. In deciding the question all the surrounding cir-
cumstances ought to be taken into consideration, and are admissible
in evidence; and if an issue of fact arises as to the circumstances,
the jury is the proper tribunal to decide that issue: *Dowden & Pook*
Lim. v. Pook, 73 L. J. K. B. 38; (1904) 1 K. B. 45; 89 L. T. 688;
52 W. R. 97; 20 T. L. R. 38.

The plaintiff and defendant were engaged as partners in the
business of nurserymen and fruit sellers. Upon dissolving partnership,
the plaintiff continued the fruit branch and the defendant the nursery
branch, each agreeing that for ten years he would not engage in the
kind of business to be done by the other. The defendant's covenant
was that he would not compete with the plaintiff in the fruit business,
provided the plaintiff should "continue for such time to carry on
the fruit business."—Held, that this was to be read as a personal
engagement for ten years by the defendant that he would not inter-
fere with the fruit business of the plaintiff, provided that the plaintiff
should always during that time continuously carry on as proprietor
that business; and the plaintiff had ceased to carry on the fruit
business by entering into an incorporated company and transferring
to that body his plant, property, and goodwill in the business, although
he was a shareholder and acted as manager while the company did
business, and, when that ceased, resumed the fruit business on his
own account; and, therefore, he was not entitled to restrain the
defendant from engaging in the fruit business during the ten years.
In re Sax, Barned v. Sax (1893), 62 L. J. Ch. 688, 68 L. T. N. S.
849, 41 W. R. 584, 3 R. 638, approved and applied: *Carpenter v.*
Carpenter, 15 O. L. R. 9.

There is no general and absolute rule that a mortgagor and Mortgage
mortgagee cannot at the time of entering into the mortgage transaction and
enter into some other agreement from which the mortgagee gets some mortgagee
advantage. So long as such collateral agreement is not unconscion-
able or oppressive, and so long as it does not place any absolute fetter
on the right of the mortgagor to redeem on payment of principal,
interest, and costs, it is not invalid. *Jennings v. Ward* (2 Vern.
520) and *Edwards' Estate In re* (11 Ir. Ch. Rep. 367) discussed:
Biggs v. Hoddinott, 67 L. J. Ch. 540; (1898) 2 Ch. 307; 79 L. T.
201; 47 W. R. 84.

A mortgage is a conveyance of property as a security for the
payment of a debt, or the discharge of some other obligation, and
the security is redeemable on such payment or discharge, and any
provision inserted to prevent such redemption is a fetter on the

equity of redemption and is void; but the amount or nature of the debt or obligation is not a fetter: *Santley v. Wilde*, 68 L. J. Ch. 681; (1899) 2 Ch. 474; 81 L. T. 393; 48 W. R. 90.

Money
paid under
illegal
contract.

The rule of law that, where one of two parties to an illegal contract pays money to the other in pursuance thereof, he cannot recover it back, it is not displaced by the fact that the contract was entered into in consequence of an innocent misrepresentation of the law made by the other party, in the absence of proof of fraud, duress, oppression, or such a difference in the position of the parties as would create a fiduciary relationship between them: *Harse v. Pearl Life Assurance Co.*, 73 L. J. K. B. 373; (1904) 1 K. B. 558; 90 L. T. 245; 52 W. R. 457; 20 T. L. R. 264.

Penalty
imposed—
effect.

Where by a statute a penalty is imposed—not solely for the protection of the revenue, but solely or partly for that of the public—for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal: *Victorian Daylesford Syndicate v. Dott*, 74 L. J. Ch. 673; (1905) 2 Ch. 624; 93 L. T. 627; 54 W. R. 231; 21 T. L. R. 742. *S. P. Bonnard v. Dott*, 75 L. J. Ch. 446; 1906) 1 Ch. 740; 94 L. T. R. 399.

Indemnity
against
liability on
bail bond.

An agreement to indemnify against liability of a person who has entered into recognisance for the appearance of a defendant in a criminal matter is invalid as being contrary to public policy, although the indemnity be given by a person other than the defendant: *Consolidated Exploration and Finance Co. v. Musgrave*, 69 L. J. Ch. 11; (1900), 1 Ch. 37; 81 L. T. 747; 48 W. R. 298; 64 J. P. 89.

Transfer of
property-
interest.

Held, that a conveyance made for the purpose of enabling an irresponsible person to justify as special bail was a transaction against good conscience and morality: *Langlois v. Baby*, 11 Chy. 21. A contract for transfer of property with intent by the transferor and for the purpose that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose, is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it, will not void the contract unless from the particular nature of the property and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended. Judgment below, 20 A. R. 198, *sub nom Hager v. O'Neil*, affirming 21 O. R. 27, affirmed: *Clark v. Hager*, 22 S. C. R. 510. Courts of equity cannot any more than Courts of law, on the footing of want of notice of the illegality, give effect to proceedings which on principles of the common law and under Acts of Parliament are utterly void: *Gardiner v. Juson*, 2 E. & A. 188. Notes sued upon having been given on the illegal agreement held not enforceable: *Rawlings v. Coal Consumers' Association*, 43 L. J. M. C. 111; *Windhill Local Board of Health v. Vint*,

45 Ch. D. 351; and *Jones v. Merionethshire Permanent Benefit Building Society* (1891), 2 Ch. 587, followed: Held, also, that as part of the consideration for the agreement was illegal the whole was bad. *Lound v. Grimwade*, 39 Ch. D. at p. 613, followed: *Legatt v. Brown*, 29 O. R. 530, 30 O. R. 225.

Transactions on Margin: *French v. Brink*, 1 O. W. N. 790.

One who sells promising to deliver to the purchaser in a foreign country goods, the importing of which to his knowledge is prohibited by the laws of that country, is obliged, in case of confiscation of the article sold, to repay the price to the purchaser, where the latter was ignorant at the time of the sale of the prohibition: *Quigley v. Desjardins*, Q. R. 24 S. C. 434.

When goods sold are deliverable in a foreign country, where the importation of that kind of goods is prohibited to the knowledge of the purchaser, the vendor who assumes all risk of confiscation of the goods until delivery, is not responsible to the purchaser if after delivery and acceptance by the latter the goods are confiscated by the customs' authorities: *Couch v. Desjardins*, Q. R. 24 S. C. 543.

In an action for damages for breach of a covenant not to carry on a certain business it was held that general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him of such business. *Ratcliffe v. Evans* (1892), 2 Q. B. 524, applied and followed. 2. That damages were properly assessed up to the date of the judgment. *Stalker v. Dunwick*, 15 O. R. 342, followed: *Turner v. Burns*, 24 O. R. 28. A covenant not to sue entered into by the creditor with the principal debtor without the surety's consent, but with a reservation of remedies against other parties, does not discharge such surety: *Hall v. Thompson*, 9 U. C. C. P. 257. A stipulation not to sue one of two judgment debtors is no discharge of the other, though there should be no express reservation of rights as against such other: *Dewar v. Sparling*, 18 Chy. 633.

One who is a party to an immoral contract cannot enforce it. The general rule is that where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by the statute or by the common law, you may reject the bad part and retain the good: *Kitching v. Hicks*, 6 O. R. 339. Where a party succeeds in establishing the illegality of an instrument he will not be allowed to enforce any stipulation that may be contained therein for his benefit: *Attorney-General v. Niagara Falls International Bridge Co.*, 20 Chy. 490.

Where a father enters into a contract whereby he parts with the custody and control of his child with the *bona fide* intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and although where such a contract is executory on both sides the Court cannot decree specific performance by reason of the want of mutuality, where the contract has been faithfully performed so far as the father and child are concerned, so that their status has become altered, the Court will if possible enforce in specie the performance of the contract by the other party to it: *Roberts v. Hall*, 1 O. R. 388.

As to the promise of the defendant not to marry again, it was merely an expression of intention. Had there been an agreement it would have been void on the ground of public policy. In Pollock on Contracts, 7th ed., p. 531, it is said "that a contract by a widow or widower not to marry would probably be good," citing *Scott v. Tyler* (1888), 2 Bro. C. C. 432. There is not a word which supports the statement in Pollock. In *Law v. Peers*, 4 Burr. 2225, it was held that a contract in general restraint of marriage was void: *Shep. Touch.* 132; *Jones v. Jones*, 1 Q. B. D. at p. 282; *Bradley v. Bradley*, 1 O. W. N. 110.

IMPOSSIBILITY.

No action lies for the non-performance of a term of the contract, which term is on its face impossible of performance by any of the parties: *Stratford v. Stratford*, 26 A. R. 109.

Each case of this kind must be judged by its own circumstances, and the questions to be asked are: First, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? And thirdly, was the event which prevented it of such a character that it could not reasonably be said to have been in the contemplation of the parties at the date of the contract. Parol evidence is admissible to shew what the subject matter of the contract, and if the last two questions are answered in the affirmative both parties are discharged from further performance of the contract. The principle of *Taylor v. Caldwell* (32 L. J. Q. B. 164; 3 B. & S. 826) applied: *Krell v. Henry*, 72 L. J. K. B. 794; (1903) 2 K B. 740; 89 L. T. 328; 52 W. R. 246.

Where money has been paid under a contract, the further performance of which has become impossible owing to the non-existence of the subject-matter of the contract, the contract is not rescinded *ab initio*, but both parties are excused from any further performance under the contract: *Blakely v. Muller*; *Hobson v. Pattenden*, 88 L. T. 299; 67 J. P. 51.

Where a person by a contract takes upon himself the responsibility that certain events shall take place, or to pay damages if from any cause he is prevented from carrying out the contract, the fact that the contract becomes impossible of performance does not excuse such a party for non-performance of the contract: *Ashmore v. Cox*, 68 L. J. Q. B. 72; (1899) 1 Q. B. 436.

INDIANS.

The Indian Act, R. S. C. c. 81, enacts as follows:—

102. No person shall take any security or otherwise obtain any lien or charge whether by mortgage, judgment or otherwise upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections,* provided, that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid.

No lien or charge to be taken on property of Indians

103. Indians and non-treaty Indians shall have the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them; provided that in any suit or action between Indians, or in any case of assault in which the offender is an Indian, no appeal

As to rights of action by Indians.

* The following are the three sections above referred to:—

99. An Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

Liability of Indians to taxation.

100. No taxes shall be levied on the real property of any Indian acquired under the enfranchisement clauses of this Part, until the same has been declared liable to taxation by proclamation of the Governor-in-Council, published in the Canada Gazette.

As to taxes on property of an enfranchised Indian.

101. All lands vested in the Crown, or in any person in trust, or for the use of any Indian or non-treaty Indian, or any band or irregular band of Indians or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold, or agreed to be sold, to any person; and except as against the Crown, and any Indian located on the land, the same shall be liable to taxation in like manner as other lands in the same locality; provided that nothing herein contained shall interfere with the right of the Superintendent-General to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

Exemption from taxation.

shall lie from any judgment, order or conviction by any police magistrate, stipendiary magistrate, or two justices of the peace, or an Indian agent, when the sum adjudged or the penalty imposed does not exceed ten dollars.

Things pawned by Indians for intoxicants not to be retained.

104. No pawn taken from any Indian or non-treaty Indian for any intoxicant shall be retained by the person to whom such pawn is delivered, but the thing so pawned may be sued for and shall be recoverable with costs of suit, in any court of competent jurisdiction by the Indian or non-treaty Indian who pawned the same.

Exemption from seizure.

105. No presents given to Indians or non-treaty Indians, and no property purchased or acquired with or by means of any annuities granted to Indians, or any part thereof, and in the possession of any band of such Indians, or of any Indian of any band or irregular band, shall be liable to be taken, seized or distrained for any debt, matter, or cause whatsoever.

Traffic in presents and property restricted.

2. No such presents or property shall, in the provinces of Manitoba, British Columbia, Saskatchewan or Alberta, or in the Territories, be sold, bartered, exchanged, or given by any band, or irregular band of Indians, or any Indian of any such band to any person or Indian other than an Indian of such band.

Animals, farming implements, etc., deemed presents.

3. Animals given to Indians under treaty stipulations, and the progeny thereof, and farming implements, tools, and any other articles given to Indians under treaty stipulations, shall be held to be presents within the meaning of this section.

Sale, etc., null and void.

4. Every such sale, barter, exchange, or gift shall be null and void unless such sale, barter, exchange or gift is made with the written assent of the Superintendent-General or his agent.

On an application, which was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside of the reserve: Held, that since the repeal of C. S. C. c. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, s. 77 (D.) the action will not bind any property of the Indian except that described in section 75: *Bryce v. Salt*, 11 P. R. 112.

Status, how proved.

The status of an Indian as such may be proved by his certificate of birth, his general reputation, his residence in the reserve, or his election as a municipal councillor. The real and personal property of Indians inside the reserve is exempt from seizure under execution: *Charbonneau v. Lorimier*, 8 Q. P. R. 115.

Section 91, sub-section 24, of the British North America Act, 1867, by which the Parliament of Canada has exclusive legislative authority over "Indians and Lands reserved for the Indians," does not vest in the Government of the Dominion any proprietary rights

in such lands or power by the legislation to interfere therewith in infringement of the proprietary rights of the province in which the lands are situated.

The choice and location of lands to be appropriated as Indian Reserves can only be effected by joint action of the Provincial and Dominion Governments. But when such lands are surrendered by the Indians, the result is to vest them in the Crown for the beneficial use of the province whose grantees' title prevails over the title purported to be granted by the Dominion. *St. Catharines Milling and Lumber Co. v. Reg.* (58 L. J. P. C. 54; 14 App. Cas. 46) followed: *Ontario Mining Co. v. Seybold*, 72 L. J. P. C. 5; 87 L. T. 449.

Order for representation set aside: *Chisholm v. Herkimer*, 1 O. W. N. 139.

The petitioner, caveator, was a Treaty Indian, who before receiving a Crown patent for his land, agreed to sell same to P. He executed a deed in which the grantee, instead of being P., was the defendant. After the issue of the patent another deed was delivered to the defendant. The caveator having applied for a certificate of title under the above real Property Act, held, that although an Indian he was a British subject and had a right to sell. The deed was not void as being prohibited by the Indian Act, nor was it procured by fraud. Further that the Estoppel Act applies to the petitioner. Petitioner to have one month to begin an action to establish a vendor's lien for unpaid purchase money and such other relief as he may be advised: *Sanderson v. Heap*, 11 W. L. R. 238.

Indian Lands—Dealings With—How far Governed by Registry Law of Ontario.—*Re Reed & Wilson*, 23 O. R. 552.

Parliament may remove an Indian from the scope of the provincial laws, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there: *Rex v. Hill*, 15 O. L. R. 406.

INFANCY.

Infancy is a good defence, unless the action be for necessities. The question of what are necessities is to be governed by the fortune and circumstances of the infant, and the proof of those circumstances lies on the plaintiff. A contract by an infant other than for necessities is voidable only, not void, and may be ratified by him after he attains his majority. The ratification, to be good, must be in writing: *R. S. O. 1897, c. 146, s. 6*. An action by an infant without next friend, infant may be bound by proceedings: *Millson v. Small*, 25 O. R. 144. May be proved by calling any person who can speak as to the time of birth, or by declarations of deceased members of family. Extracts from the records of the Registrar-General of the Province.

under R. S. O. 1897, c. 44, s. 7, are *prima facie* evidence of the facts therein stated. If defendant of age when action commenced, the date of contract must be shewn as well as fact of non-age. Infancy does not prevent running of statute relating to medical practitioners (R. S. O., c. 176, s. 41): *Miller v. Ryerson*, 22 O. R. 369. A conveyance of land by an infant is voidable only, and may be avoided by him after coming of age. Mere omission to disaffirm such a deed is not sufficient evidence to warrant a jury in finding a confirmation: *Doe dem. Seely v. Charlton*, vol. 21, 119 (N.B.). An infant trader bought goods from plaintiff, part of which were found by the Judge to have been given by him to his boarding-house keeper on account of his board: Held, that the fact of the goods being so applied did not render them necessities so as to enable the plaintiff to recover, and that the judgment must be entered for defendants with costs: *Jenkins v. Way*, 2 R. & G. 394, 2 C. L. T. 108 (N.S.). The deed of an infant is voidable only; and the infancy cannot be given in evidence to invalidate the deed in a suit between third parties: *Donohoe v. Hallett*, Trin. T. 1828 (N.B.). A contract of promise of marriage by an infant can only be avoided by the act of the infant, and not by the act of her guardian: *Parks v. Maybee*, 2 U. C. C. P. 257. See *Smith v. Jamieson*, 17 O. R. 626. The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner v. Grace*, 1 F. & F. 359, followed: *Merritt v. Heppenstal*, 25 S. C. R. 150. *Sangster v. T. Eaton Co.*, 24 S. C. R. 708. The rule is now well established that the deed of an infant is not void *ab initio*, but voidable on his attaining majority. If he wishes to avoid it he must expressly repudiate his contract within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmation of it: *Foley v. Canadian Permanent Loan and Savings Co.*, 4 O. R. 38.

To constitute a ratification after full age, of a debt contracted during infancy, there must be at least an admission of an existing liability. The meaning of words used in a document signed by the debtor will not be strained so as to defeat the operation of the statute passed in his favour: *Louden Manufacturing Company v. Milmine*, 14 O. L. R. 532.

Payment of premium by infant apprentice. Infant liable: *Walter v. Everard*, C. A. (1891), 2 Q. B. 369.

If a minor fraudulently represents himself to be of age, for the purpose of effecting a loan of money, he will not be permitted afterwards to set up the fact of his infancy as a defence to a suit to enforce payment of a security created by him on effecting such loan: *Goyer v. Morrison*, 26 Chy. 69.

The owner of real estate six months before attaining his majority, applied to effect a loan on the security thereof, alleging in answer to

a question, that he was then of full age. A mortgage was accordingly executed and the money advanced; this the mortgagor expended in the purchase of other lands, which, together with the land so mortgaged he, on the day after he attained twenty-one, conveyed to his mother for a nominal consideration: Held, that the minority of the mortgagor could not be set up in answer to a bill to enforce payment of the mortgage, but the same remained a valid and subsisting charge upon the land held by his grantee: *Ib.*

To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation: *Confederation Life Association v. Kinnear*, 23 A. R. 497.

A boy of eleven years of age and of sufficient intelligence in the estimation of the Court to understand the probable consequence of his actions, is liable for contributory negligence in the case of an accident, while attempting to board a tramway car as a trespasser and in disobedience to orders of the schoolmaster in charge of him: *Normand v. Hull Electric Co.*, Q. R. 35 S. C. 329.

Unless for necessities, the contract of an infant is not binding on him, nor is he liable for a fraudulent representation that he is of full age whereby the plaintiff is induced to contract with him; and he is entitled to plead infancy in order to escape from a contract procured by his fraud when an infant: *Jewell v. Broad*, 19 O. L. R. 1.

The rule that an infant's contract is voidable, but binding upon the infant unless repudiated within a reasonable time after attaining majority, does not apply where the infant after entering into the contract acquires a foreign domicile and becomes under the law of the country of domicile incapable of validly ratifying the contract made by her: *Viditz v. O'Hagan*, 69 L. J. Ch. 507; (1900), 2 Ch. 87; 82 L. T. 480; 48 W. R. 516.

An infant's contract need not be affirmed after the infant comes to age to render it good. It is valid until disaffirmed, and unless repudiated within a reasonable time the infant is absolutely bound by it: *Edwards v. Carter* (63 L. J. Ch. 100; (1893), A. C. 360), and *Hodson v. Knight* (63 L. J. Ch. 609; (1894), 2 Ch. 421), is consistent with the decision of the House of Lords in *Edwards v. Carter* (*supra*). There is no inconsistency between *Cooper v. Cooper* (13 App. Cas. 88), and *Edwards v. Carter* (*supra*). *Van Grutten v. Digby* (32 L. J. Ch. 179; 31 Beav. 561), followed. *Viditz v. O'Hagan*, 68 L. J. Ch. 553; (1899), 2 Ch. 569; 80 L. T. 794; 47 W. R. 571.

An infant's contract of service is not necessarily invalid because it contains stipulations some of which are void as being in restraint of trade and unnecessary for the protection of the master's business.

If the void stipulations are severable from the rest of the contract they may be disregarded, and the rest of the contract is binding on the infant if it is for his benefit: *Bromley v. Smith*, 78 L. J. K. B. 745; (1909), 2 K. B. 235; 100 L. T. 731.

INSANITY.

The contracts of a lunatic, entered into fairly and *bona fide* with a person ignorant of the incapacity, where the transaction is in the ordinary course, and wholly or in part executed, are valid. Insanity, and the probable knowledge of it by the opposite party, may be proved by shewing that it existed and was apparent either shortly before or shortly after the alleged contract: *Beaven v. M'Donnell*, 9 Ex. 309. In order to avoid a deed made by a lunatic or a person in a state of intoxication two things must be established: 1st, his incapacity to contract; 2nd, his equitable right to be believed, and where the incapacity to contract as the result of dissipation was established, and inadequacy of consideration shewn, the Court granted relief: *Jones and Wife v. Calkin et al.*, 3 Pug. 356 (N.B.).

INTOXICATION.

A contract entered into by a person in a state of intoxication is voidable, not void: *Matthews v. Baxter*, L. R. 8 Ex. 132.

Drunkenness is not a ground for setting aside a contract unless the person was so intoxicated as not to know what he was doing. *Vivian v. Scoble*, 1 Man. L. R. 125, followed. *McLaren v. McMillan*, 16 Man. L. R. 604.

A will made at a time when the testator was drunk, leaving his property to trustees with an absolute discretion to pay or not to pay the testator's wife any part of the income, was set aside, where it appeared that the testator was affectionate to his wife when sober, but the reverse when drunk: *Campbell v Campbell*, 5 W. L. R. 59, 6 Terr. L. R. 378.

LACHES.

Situation of Parties not Changed.—The situation of the parties not having been changed, the defendant was not bound by laches: *McDonald v. McDonald*, 17 A. R. 192.

See Action for Account, page 479, ante.

LIEN.

See also Action for Conversion, p. 453.

A bank has a lien of all moneys, funds and securities, deposited for the general balance of a customer's account. Where, therefore, a

bank held two promissory notes of a customer, one payable three months after date, and secured by an indorser, and another payable on demand without any indorser, upon which the customer had made a payment, nothing being paid on the indorsed note, and on the customer's death there was a credit balance in his favour in the bank, which the bank applied toward payment of the unindorsed note: Held, that the bank was justified in doing so, notwithstanding that it appeared at such time that the customer was insolvent: *In re Williams*, 7 O. L. R. 156.

It is not necessary that the proprietor of a wharf or quay upon navigable waters used for the loading and unloading of vessels should have a warehouse or shed, or other convenience, for the storage of goods and protection thereof from the weather; and as such wharfinger, he is entitled to a lien on goods unloaded at his wharf for money due to him for wharfage. *Renald v. Walker*, 8 U. C. C. P. 37, and *Llado v. Morgan*, 23 U. C. C. P. 517, referred to, observed upon, and though doubted, followed: *Sills v. Bickford*, 26 Chy. 512.

A stockbroker has in the absence of special agreement to the contrary, a general lien on a customers securities which are in his hands in the course of his business: *Jones v. Peppercorne* (28 L. J. Ch. 158; Johns. 430), followed. *London and Globe Finance Corporation, In re*, 71 L. J. Ch. 893; (1902), 2 Ch. 416; 87 L. T. 49.

A livery-stable keeper has no lien on a horse for its stabling and keep as against the real owner when the horse was stolen and placed with him by the thief: *Harding v. Johnston*, 18 Man. L. R. 625, 10 W. L. R. 712.

Ont. Stats. 1910, c. 26, s. 9, is as follows: No tavern keeper or boarding house keeper shall keep the wearing apparel of any servant or labourer in pledge for a greater sum than \$6, and on payment or tender of such sum, or of any less sum due, such wearing apparel shall be immediately given up, whatever be the amount due by such servant or laborurer; but this is not to apply to other property of the servant or labourer.

Innkeeper, etc., not to keep wearing apparel of servant or labourer in pledge for more than \$6.

LIMITATIONS, STATUTES OF.

The statutes relating to limitations of actions in Ontario are now contained in Ont. Statutes 1910, c. 34.

By the Trustee Act, sec. 46-48 of above Act, the Statutes of Limitation now run in favour of trustees: see *Stephens v. Beatty*, 15 C. L. T. 398.

Upon issue joined on this defence burden of proof lies on plaintiff.

Time of limitation is to be computed exclusive of day on which cause of action arose.

Statute runs from time of breach of promise or contract, and not discovery of it. In case of fraudulent concealment, from its discovery.

A note payable on demand is payable immediately, and the statute begins to run from that date: *Norton v. Ellam*, 2 M. & W. 461. Where the note is payable after sight, the statute runs only from the time of presentment: *Holmes v. Kerrison*, 2 Taunt. 323. Where the cause of action does not arise until after request made, the statute will only run from the time of such request: *Gould v. Johnson*, 2 Salk. 422.

Ont. Statute 1910, c. 34, s. 50.

All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise as between merchant and merchant, their factors and servants, must be commenced within six years after the cause of action.

Limitations of other actions are as follows:—

Twenty years.

(a) Actions for rent upon an indenture of demise.

(b) Actions upon a bond or other specialty, except a mortgage covenant.

(c) Actions upon a recognizance.

Six years.

(d) Actions upon an award where the submission is not by specialty.

(e) Actions for an escape.

(f) Actions for money levied on execution.

(g) Actions for trespass to goods or land, debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander.

Two years.

(h) Actions for penalties, damages, or sums of money given to the Crown or to the party aggrieved by any statute.

(i) An action upon the case for words.

Ten years.

(k) Actions upon any covenant contained in any mortgage made on or after 1st July, 1894.

One year.

(l) Actions for penalties by informers or by any person not being person aggrieved.

A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. 1887, c. 60, s. 1. In view of the amendment made in R. S. O. 1877, c. 108, s. 23, by

the revision of 1887, R. S. O. 1887, c. 111, s. 23, the English authorities, such as *Jay v. Johnston* (1893), 1 Q. B. 189, and cases there cited do not apply. *Boice v. O'Loane*, 3 A. R. 167, followed. Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full," and the solicitor indorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance. *Day v. McLea*, 22 Q. B. D. 610, applied. Section 53, s.s. 7, Judicature Act as to part performance of an obligation in satisfaction, considered: *Mason v. Johnston*, 20 A. R. 412.

Notwithstanding R. S. O. 1877, c. 108, s. 23 (see R. S. O. 1897, c. 132, s. 23), twenty years is the period of limitation applicable to an action on a judgment of a Court of Record. *Boice v. O'Loane*, 3 A. R. 167, and cases following it, followed in preference to *Jay v. Johnston* (1893), 1 Q. B. 25, 189: *Butler v. McMicken*, 32 O. R. 422.

Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them: *Doe d. Auldjo v. Hollister*, 5 O. S. 739.

Poverty is no excuse for delay in making application to the Court, as in such a case the party can apply *in forma pauperis*: *Harris v. Myers*, 1 Ch. Ch. 229.

The acknowledgment of a debt within Lord Tenterden's Act made by one of several executors as executors binds the testator's estate: *Re Macdonald, Dick v. Fraser* (1897), 2 Ch. 181. See *Aspbury v. Aspbury* (1898), 2 Ch. III.

An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff, even though it has been duly renewed from time to time and kept in force continuously, and sale proceedings cannot be taken under it after that time. *Neil v. Almond*, 29 O. R. 63, approved: *In re Woodall*, 8 O. L. R. 288.

Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefor then arises and the Statute of Limitations then begins to run: *McFadden v. Brandon*, 8 O. L. R. 610.

Sub-section 8 of s. 5 of R. S. O. 1887, c. 111, applies to the case of an implied trust, and a purchaser in possession, with the assent of his vendor, and not in default is, therefore, not to be deemed to be a

tenant at will to his vendor within the meaning of s.-s. 7. *Warren v. Murray* (1894), 2 Q. B. 648, applied. Judgment in 28 O. R. 92 affirmed: *Irvine v. Macaulay*, 24 A. R. 446.

Infants.

Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infants will be barred. *Quinton v. Firth*, Ir. R. 2 Eq. 415. considered and not followed. Decision in 8 P. R. 207 reversed: *In re Talyor*, 28 Chy. 640.

Agreements to purchase.

Payment of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment. Entries in the handwriting of a deceased person in his books of account, made in the ordinary course of his business, are admissible under s. 38, c. 127, C. S. N. B. 1903, and the first entry being admitted to be a payment on account of a land purchase, the second was evidence of a payment on the same account on the 23rd of May, 1886. Where an entry in the handwriting of a deceased person is *prima facie* against interest, it is admissible for all purposes, irrespective of its effect or value when received. An oral admission by a person holding under an agreement to purchase, that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor. As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under s. 30 of c. 139 of C. S. N. B. 1903, and is also as a mortgagee within the exception provided by s. 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest: *Anderson v. Anderson*, 37 N. B. R. 432, 1 E. L. R. 443.

Allowance for road.

The public cannot release their rights, and there is no extinctive presumption or prescription. Therefore, where an original allowance for road had been taken possession of and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards: Held, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening up the same: *Nash v. Glover*, 24 Gr. 219.

See *Drummell v. Wharin*, 12 Chy. 283.

Moneys in Court.

Statutes of limitation have relation only between subject and subject—the Crown cannot be bound by them. The Supreme Court of Judicature for Ontario is a public trustee as to all moneys and securities in its hands. Moneys in Court are in *custodia regis*, and to such a fund and such custodian the Statute of Limitations has no pertinence. Suitors and claimants are not barred by any lapse of

time in their application for payment out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution, if they have improperly or fraudulently received moneys from the Court to which they have no just claim. Restitution was ordered after a period of fourteen years, without interest, as the mistake was that of an officer of the Court: *Allstadt v. Gortner*, 31 O. R. 495.

To bar a plaintiff in ejectment under the Statute of Limitations he must not only have been out of possession for twenty years, but there must have been actual possession by another: *Lloyd v. Henderson*, 25 U. C. C. P. 253.

Where a right to relief in respect to land arises during the progress of a cause, and more than ten years are allowed to elapse before action thereon, such right will be barred by the Real Property Limitation Act, R. S. O. 1887, c. 108: *Ross v. Pomeroy*, 28 Chy. 435.

An acknowledgment to a party's trustee is sufficient to take a case out of the statute: *McIntyre v. Canada Co.*, 18 Chy. 367.

Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot. It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing, and cultivating, has been limited to a portion; and in this case there was evidence legally sufficient to warrant such inference. *Seemle*, that a squatter will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not merely desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession: *Dundas v. Johnson*, 24 U. C. R. 547.

Sections 54 and 55 of Ontario Statute, c. 34, relate to Acknowledgments or Promises. In the case of an indenture, a specialty or recognizance, twenty years is the limit. In the case mentioned in (k), page 554, of a covenant in a mortgage, ten years is the limit. Promise by words only is not sufficient to take out any of the cases mentioned on pages 554, 555, actions of account and upon the case—on simple contract claims or of debt for arrears of rent.

Where A. has been twenty years in possession, paying no rent, and signing no written acknowledgment of title in another, such possession, whether it originate adversely to the claims of the true owner, B., or with his permission, operates under the statute to ex-

tinguish the title of B. and vest the title in A.: *Doe d. Perry v. Henderson*, 3 U. C. R. 486.

Parent
and child.

Where a son has been allowed by his father to remain in possession for twenty years, and it cannot be shewn that he was there as the servant or agent of his father, or has paid rent within the twenty years, or acknowledged the father's title in writing, the father will lose his title, no matter what the understanding of both parties as to the real ownership may have been: *Doe d. Quincey v. Caniffe*, 5 U. C. R. 602.

Common
error.

The fact that both plaintiff and defendant were under a common error as to the true boundary of their lands will not prevent the statute from running against the true line, though it would be otherwise if it had been agreed upon between them that a certain line should govern whether correct or not: *Martin v. Weld*, 19 U. C. R. 631.

A possession inadvertently held under an erroneous impression as to boundary, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would by mere lapse of time ripen into a title: *Doe d. Taylor v. Sexton*, 8 U. C. R. 264. See *McGregor v. Keiller*, 9 O. R. 677.

While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant: Held, that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour: *Rennie v. Frame*, 29 O. R. 586.

The Statute of Limitations does not run against the Crown, and it makes no difference that the land is vested in the Crown as trustee. Where, therefore, in ejectment by the Crown for land held as trustee for the University of Toronto under C. S. C. c. 62, s. 65, it appeared that defendant had held possession for twenty-seven years, the plaintiff was nevertheless: Held, entitled to succeed: *Regina v. Williams*, 39 U. C. R. 397.

Nuisance.

Held, that twenty years' user will legitimate an easement affecting private property, but not a nuisance: *Regina v. Brewster*, 8 U. C. C. P. 208.

A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During

such unity of possession the running of the Statute of Limitations is suspended: *Stothart v. Hillard*, 19 O. R. 542.

The time for acquisition of an easement by prescription does not Easement run while the dominant and servient tenements are in the occupation of the same persons, even though the occupation of the servient tenement be wrongful and without the privity of the true owner: *Innes v. Ferguson*, 21 A. R. 323; *Ferguson v. Innes*, 24 S. C. R. 703.

Where the true owner of land in exercise of his right enters upon any portion of the land which is not in the actual possession of another, the entry is deemed to refer to the whole land: *Great Western R. W. Co. v. Lutz*, 32 U. C. C. P. 166.

"State of nature" in s.-s. 4, s. 5, R. S. O., c. 133, is used in contradistinction to "residing upon or cultivating." Unless the patentee of wild lands or some one claiming under him has resided upon the land or has cultivated or improved it or actually used it, the twenty years' limitation applies. Clearing or cultivating by trespassers will not avail to shorten the limit. *Quare*, is fencing a lot sufficient? *Stovel v. Gregory*, 21 A. R. 137. Vacant land as between mortgagor and mortgagee: *Delaney v. C. P. R.*, 21 O. R. 11. An acknowledgment to a person who afterwards becomes administrator is good (*Quare*): *Robertson v. Burrell*, 22 A. R. 356. As to tenant in common: *Hill v. Ashbridge*, 20 A. R. 44; *Howard v. O'Donohue*, 19 S. C. R. 341. Compensation paid by railway company to life tenant: *Young v. Midland*, 19 A. R. 265. The provisions of R. S. O., c. 166 (Lord Campbell's Act) are not affected by special railway legislation (*e.g.*, Railway Act): *Zimmer v. G. T. R.*, 19 A. R. 693. A payment to a mortgagee by a party not interested in the mortgaged premises will not enure to the benefit of the mortgagee: *Trust & Loan v. Stevenson*, 20 A. R. 66. In a company there is no liability to pay for shares until a call is made and notice thereof given to the shareholder, and until that time the statute does not begin to run against the company: *Re Haggart Bros. Co.*, 19 A. R. 582. The owner of land on the sea shore or on a navigable river is entitled to free ingress and egress thereto and therefrom: Held, that no length of time during which occasional acts of obstruction were permitted would debar him of those rights: *Collins v. Barss*, 2 Thom. 281 (N.S.). Proof of a promise to pay as "soon as possible" is not sufficient to take a case out of the Statute of Limitations without proof of defendant's ability to pay. Haliburton, J., dissenting: *Murdock v. Pitts*, James, 258 (N.S.). Under the Nova Scotia Statute of Limitations (R. S. N. S. (5th ser.), c. 112), a possession of land in order to ripen into a title and oust the real owner must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute the interruption to the person having title. A possession by a series of

Acts of
trespass.

persons during the necessary period will bar the title though some of such persons in possession were not in privity with their predecessors: *Handley v. Archibald*, 30 S. C. R. 130. Isolated acts of trespass committed on wild lands from year to year will not give the trespasser a title under the Statute of Limitations: *Sherren v. Pearson*, 14 S. C. R. 581. As to the application of the Ontario Act, R. S. O. 1877, c. 108, reducing the period of limitation to ten years to the interruption, or ten years to the interruption of an easement: see *Mykel v. Doyle*, 45 U. C. R. 65. Twenty years' user will legitimate an easement affecting private property, but not a nuisance: *Regina v. Brewster*, 8 U. C. C. P. 208. The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner: *Innes v. Ferguson*, 21 A. R. 323, 24 S. C. R. 703. A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally apart from his ownership and use of the lot: *Robinson v. Purdon*, 26 A. R. 95, 30 S. C. R. 64. Where two properties belonging to the same owner are sold at the same time, and each purchaser has notice of sale to the other, the right to any continuous easement passes with the sale as an absolute legal right: *Hart v. McMullen*, 30 S. C. R. 245. The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level, although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon, although by so doing he keeps back the surface water to the injury of the owner of the land of higher level: *Ostrom v. Sills*, 24 A. R. 526, 28 S. C. R. 485: Held, reversing the judgment appealed from (18 Ont. App. R. 529) that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession therefore continued to be that of caretaker and he had acquired no title by possession: *Ryan v. Ryan* (5 Can. S. C. R. 387), *Heward v. O'Donohue*, 19 S. C. R. 341.

Doctrine
of domi-
nant and
servient
tenement.

In case a plaintiff is, at the time of the cause of action accruing, an infant or *non compos*, the six years run from the removal of the disability.

A plaintiff resident without the limits of Ontario has no longer period of time to commence an action than if he were resident in Ontario when the cause of action accrued.

In the case of a defendant without the limits of Ontario at the time of the action accruing, the action may be brought within such

times as are above mentioned after the return of the absent person to Ontario.

In cases where some joint debtors have been within and some joint without Ontario, no further time is allowed to commence action against any of the joint debtors who were within Ontario when the action accrued by reason only that some other of the joint debtors were at that time without Ontario.

A judgment recovered in such a case will not be a bar to another action against the joint debtor who was without Ontario.

The effect of the Statute of Limitations may be avoided by proof of an unqualified acknowledgment of the debt within six years, which is evidence of a new promise to pay the debt, and not a mere revival of the original promise.

Part payment of a debt takes a case out of the statute, as evidence of a fresh promise to pay the debt. The payment must be such as to warrant the jury in inferring an intention to pay the rest. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt.

A part payment within six years, though proved only by an oral or unsigned admission of the defendant, will take the case out of the statute: *Cleave v. Jones*, 6 Ex. 573. An acknowledgment, or promise or part payment, by one of several co-contractors, does not make the co-contractors liable to lose the benefit of the statute: R. S. O. 1897, c. 146, s. 2. The acknowledgment or promise may be made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise. An admission of a debt made to a mere stranger can only repel the statute when it can be properly left to the jury as equivalent to or implying a promise to the plaintiff to pay him. The construction of a doubtful document given in evidence to defeat the statute is for the Court, and not for the jury, though if intrinsic facts are adduced in explanation, the facts are for the consideration of the jury: *Smith v. Thorne*, 18 Q. B. 134.

Whether the promise be qualified or not is a question of construction for the Court, and not for the jury, except where extrinsic evidence affects the construction: *Routledge v. Ramsay*, 8 A. & E. 221; *Wilson v. Rykert*, 14 O. R. 188.

Where money has been paid under a mistake of fact, the Statute of Limitations begins to run from the time of such payment, except in cases where, previous to the Judicature Act, 1873, equitable relief only could have been obtained. *Brooksbank v. Smith*, (6 L. J. Ex. Eq. 34, 2 Y. & C. 581), explained. *Baker v. Carragee*, 79 L. J. K. B. 313.

(1910) 1 K. B. 56, 101 L. T. 854. Effect of payment by one of several joint makers after enforcement of barred note: *Patterson v. Campbell*, 8 E. L. R. 49.

Possession of an upper room in a building supported entirely by portions of the storey beneath may ripen into title thereto under the provisions of the Statute of Limitations: *Iredale v. London*, 40 S. C. R. 313.

Right to
easement.

In order to establish a right to an easement by long enjoyment, the enjoyment must be of such a nature that the servient owner's attention ought reasonably to have been drawn to the existence of the easement. It is not enough that something has been visible from which an expert might have inferred the existence of the easement. The word "*clam*" as applied to the enjoyment by which an easement may be acquired, does not mean surreptitiously or fraudulently, but only in such a manner as could be reasonably expected to attract the notice of the servient owner: *Union Lighterage Co. v. London Graving Dock Co.*, 70 L. J. Ch. 558; (1901), 2 Ch. 300; 84 L. T. 527. The payment to the mortgagee of interest due upon the mortgage debt by a person who, as between himself and the mortgagor, is bound to make the payment, is a sufficient payment within section 8 of the Real Property Limitation Act, 1874, to prevent time running against the mortgagee under the statute: *Bradshaw v. Widdrington*, 49 W. R. 698. The time within which a client must assert his right as against his solicitor, to obtain, or, in case of error, to open, an account is not limited to six years or to any other definite period: *Cheese v. Keen*, 77 L. J. Ch. 163; (1908), 1 Ch. 245; 98 L. T. 316; 24 T. L. R. 136. In an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death: *Waddell v. Harshaw* (1905), 1 Ir. R. 416.

Adverse
possession.

In considering a question of laches, time runs not from the date of the conveyance, but from the date when the party seeking relief first became aware of the mistake: *Beale v. Kyte*, 76 L. J. Ch. 294; (1907), 1 Ch. 654; 96 L. T. 390. A party asserting a title to land by adverse possession should prove it most clearly and, although there is not statutory requirement that the evidence of such party and members of his family must be corroborated, it would be unsafe, unless such evidence appears to be correct beyond reasonable doubt, to hold that a title by possession has been gained in the absence of strong additional evidence by disinterested witnesses. *Sanders v. Sanders*, 19 Ch. D. 373, distinguished: *Callaway v. Platt*, 6 W. L. R. 467; 17 Man. L. R. 485. The effect of the Statute of Limitations upon the position of a person in possession of leaseholds (not an assignee) is not to transfer to him the interest of the lessee, and make him bound by the covenants in the lease, but merely to give

him the right of possession during the remainder of the lease against the lessee or those claiming under him. *Tichborne v. Weir* (67 L. T. 735), followed: *O'Connor v. Foley* (1905), 1 Ir. R. 1. The right of a shareholder in a limited company to sue for dividends on ordinary shares in arrears for more than six years, but less than twenty years, is not barred by the Statute of Limitations, as such arrears are in the nature of specialty and not simple contract debts. The same principle applies to sums due for capital returnable to the shareholders in pursuance of a resolution for reduction of capital sanctioned by the Court: *Artizans Land and Mortgage Corporation, In re*, 73 L. J. Ch. 581; (1904), 1 Ch. 96; 52 W. R. 330.

A general acknowledgment of a debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor will not or cannot pay, is sufficient to take a debt out of the Statute of Limitations: *Barrett v. Davies*, 90 L. T. 460; 52 W. R. 607; 20 T. L. R. 318. A promise to pay the balance of an original debt which may be found to be due upon taking an account is sufficient promise to take a case out of the Statute of Limitations: *Langrish v. Watts*, 72 L. J. K. B. 435; (1903), 1 K. B. 636; 88 L. T. 433; 51 W. R. 593. An agent who has authority to pay a debt of his principal has authority to promise to pay it; and where an agent acting within the scope of his authority makes a payment on account of a debt of his principal, and nothing more is said or done, a promise to pay the balance of the debt will be inferred so as to take the case out of the Statute of Limitations: *Hale, In re; Lilley v. Foad*, 68 L. J. Ch. 517; (1899), 2 Ch. 107; 80 L. T. 827; 47 W. R. 579.

Where a principal has remitted moneys to an agent for the purpose of being invested in the purchase of lands, an express trust is created, and the Statute of Limitations will be no bar to an action brought by the principal against the agent for an account in order to recover the balance of the moneys remitted to him, and not applied for the particular purpose: *North American Land and Timber Co. v. Watkins*, 73 L. J. Ch. 626; (1904), 2 Ch. 233; 91 L. T. 425; 20 T. L. R. 642.

In order to acquire a title to land under the Real Property Limitation Act, 1833, it is necessary to prove discontinuance of possession by the true owner or dispossession of the true owner.

When dispossession has been inferred from equivocal acts, the intention with which the acts are done is all-important: *Littledale v. Liverpool College*, 69 L. J. Ch. 87; (1900), 1 Ch. 19; 81 L. T. 564; 48 W. R. 177.

The "concealed fraud" which under section 26 of the Real Property Limitation Act, 1833, will prevent the running of the Real Property Limitation Acts against a plaintiff claiming real property

must, according to the principles which have been always acted upon by the Courts of Equity, be the fraud of, or in some way imputable to, the person setting up the statutes, or of some one through whom that person claims (Rigby, L.J., *dissentiente*): *McCallum, In re; McCallum v. McCallum*, 70 L. J. Ch. 206; (1901), 1 Ch. 143; 83 L. T. 717; 49 W. R. 129. The Statute of Limitations is no bar to an action by a principal against his agent in respect of moneys remitted to the agent for an express purpose and retained by him, where such agent is either in the position of an express trustee or guilty of fraudulent concealment in his accounts: *North American Land and Timber Co. v. Watkins*, 73 L. J. Ch. 626; (1904), 2 Ch. 233; 91 L. T. 425; 20 T. L. R. 642. A simple contract debt, though secured by a charge on land, is barred in six years by the Limitation Act, 1623: *Barnes v. Glenton*, 68 L. J. Q. B. 502; (1899), 1 Q. B. 885; 80 L. T. 606; 47 W. R. 435.

MAINTENANCE AND CHAMPERTY (MANITOBA).

The Criminal Law of England, as it existed on the 15th July, 1870, was introduced into Manitoba. Maintenance and champerty are not a crime, and have not been introduced as actual criminal offences in Manitoba: *Meloche v. Deguire*, 34 S. C. R. 24; *Hopkins v. Smith*, 1 O. L. R. 695, and *Briggs v. Fleutot*, 10 B. C. R. 309, do not apply to the condition of the law of Manitoba: *Thomson v. Wishart*, 13 W. L. R. 445.

MARRIAGE.

Plaintiffs, creditors of the defendant E. D., filed a bill to set aside as fraudulent and void a judgment recovered by the other defendant, E. D.'s wife, as against her husband, claiming that the husband really did not owe his wife the money for which she sued him. The defendants both stated in their answers that the husband did owe the wife the money for which the suit had been brought. At the hearing the only evidence for the plaintiffs was the testimony of some of the creditors of the husband, who showed that the debtor in giving statements of his affairs from time to time had not included the alleged indebtedness to his wife, and evidence of certain statements made by the husband respecting his wife against him:—Held, that the statements made by the husband were not evidence against his wife, and there being no evidence to displace the sworn statements of the defendants in their answers, that the bill must be dismissed with costs. One of the witnesses at the trial, Mrs. D., being present, gave evidence of an alleged statement of her husband that her judgment was got for a cloud, and plaintiffs contended that she was bound to deny this, relying on *Barber v. Finling*, 1891, Ch. 134: Held,

that such a rule as was applied in that case was not applicable in the present case, and especially since the defendant, although sitting in Court, did not understand the language spoken by the witnesses but only French. While there may be a presumption that the income of a wife's separate property received by the husband is to be regarded in the light of a gift, there is no such presumption where he has received the corpus, and the wife can without any evidence of a bargain or agreement for a loan recover back the corpus of her separate estate, even after it gets into the husband's possession: *Thompson v. Dickson*, 10 Man. Rep. 246.

The purpose of this Act was to preserve to a married woman for her own use, and as her own estate, all her own property which she had not disposed of expressly by a settlement, in like manner as if she had secured it by a settlement: *Lays v. McPherson*, 17 U. C. C. P. 261.

The separate estate of a married woman is liable for her funeral expenses: *Re Gibbons*, 31 O. R. 252.

A husband is liable for the funeral expenses of his wife, and cannot claim indemnity therefor out of her separate estate: *Constantinides v. Welsh*, 15 N. E. Rep. 631, not followed. *In re Sea*, 11 B. C. R. 324, 1 W. L. R. 466.

The plaintiff, a married woman, carried on business as a hotel-keeper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business, by taking the receipts, giving orders to servants, and mistreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business, or with the servants, or agents, or removing any of the plaintiff's chattels. *Semble*, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances: *Donnelly v. Donnelly*, 9 O. R. 673.

A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continued change of possession open and reasonably sufficient to afford public notice thereof, as required by the Bills of Sale Act: *Hogaboom v. Graydon*, 26 O. R. 298.

The rule that judgment recovered against one of two joint contractors is a bar to an action against the other, applies equally when one of the joint contractors is a married woman, contracting in respect of her separate property: *Hoare v. Niblett* (1891), 1 Q. B. 781.

When a wife claimed as against her husband's creditors certain chattels, as a gift from him while living together:—Held, that the onus of proof of title to the goods was on him, and there being no

writing or witnesses, her own evidence, although corroborated by her husband, was not sufficient to satisfy the onus: *Thompson v. Doyle*, 16 C. L. T. Occ. N. 286.

Where a wife took an active part in her husband's business, and had the custody of his money, sums paid to her were treated as paid to the husband: *Robinson v. Coyne*, 14 Chy. 561.

A husband having given notice to the plaintiff that he would not be responsible for goods furnished to his wife, who had withdrawn herself from his protection, was held not liable for goods furnished to her by the plaintiff without his knowledge after she had returned to him again: *Weaver v. Lawrence*, E. T. 2 Vict.

Where there has been a voluntary separation without provision for the wife's support, she is entitled to pledge her husband's credit for necessities: *Tait v. Lindsay*, 12 U. C. C. P. 414.

Under 35 Vict. c. 16, s. 1 (O.), a married woman can maintain an action for her wages, earned whilst living with her husband, who as agent of the defendants employed her; and the husband is a competent witness in her behalf: *McCamdy v. Tuer*, 24 U. C. C. P. 101.

A married woman having separate estate may enter into a contract along with others. Semble, if she having no separate estate is not liable under such a contract, the other contractors are liable without her: *Dingman v. Harris*, 26 O. R. 84.

Where a child dies intestate and unmarried, entitled to personal estate, leaving a father, mother, brother and sister, the father is entitled as the next of kin in the first degree, to the whole of the personal estate exclusive of all others. This rule of construction as to the distribution of personal property has not been in any way altered by any provision of the Married Women's Property Act, 1895: *Lewin v. Lewin*, 36 N. B. Repts. 365.

Husband and Wife—Alienation of Husband's Affections. *Lellis v. Lambert*, 24 A. R. 653, followed: *Weston v. Perry*, 1 O. W. N. 155.

No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, *coram populo*, by *viva voce* evidence: *Menzies v. Farnon*, 18 O. L. R. 174.

A married woman when contracting otherwise than for the benefit of her husband has all the capacity of a *feme sole* to bind her separate estate, and there can be no ground for presuming that the husband abused the confidence of the wife by exercising undue marital influence for the benefit of a stranger. *Cox v. Adams* (1904), 35 S. C. R. 393, distinguished: *Sawyer-Massey Co. v. Hodgson*, 18 O. L. R. 333.

A wife, out of moneys supplied by her husband, purchased wearing apparel for her own use. The husband did not interfere in the purchases or exercise any control over the wife in making them. She was in the habit of cutting up and adapting for her children disused wearing apparel so purchased, or of giving away or selling it, treating the proceeds of sale as her own:—Held, that wearing apparel of the wife, purchased under the above circumstances, was the separate property of the wife, and that it was not open to a jury to find that it was paraphernalia and the property of the husband. Observations of Sir F. Jeune, P., on the law of paraphernalia, in *Tasker v. Tasker* (64 L. J. P. 38, 36, (1895) P. 1, 4), disapproved of: *Masson, Templier & Co. v. De Fries* (No. 1), 79 L. J. K. B. 24, (1909) 2 K. B. 831, 101 L. T. 476, 53 S. J. 744, 25 T. L. R. 784.—C. A.

The Married Women's Property Act, 1882, has not altered the devolution of the undisposed-of separate personal estate of a married woman, even if married after the passing of the Act, the husband is entitled *jure mariti*, to the undisposed-of chattels real to which the deceased was entitled for her separate use, and administration is unnecessary to perfect his title: *Evans's Estate, In re* (1910), 1 Ir. R. 95.

MERGER.

The technical explanation of merger is as follows: Where a debtor gives his creditor a higher security for the debt due and co-extensive with it, the debt is merged by operation of law irrespective of the intention of the parties: *Price v. Moulton*, 10 C. B. 561.

The principle applicable to the merger to the charges in equity applies also to the merger of leases. The Court is guided by the intention and by the absence of express intention either in the instrument or by parol; the Court looks to the benefit of the person in whom the estates become vested: *Ingle v. Jenkins* (1900), 2 Ch. 368.

The present powers of amendment render it much less available than formerly.

The rule of equity that the question of merger must be decided by the intention of the parties applies to the merger of estates as well as of charges: *Capital and Counties Bank v. Rhodes*, 72 L. J. Ch. 336; (1903) 1 Ch. 631; 88 L. T. 255; 51 W. R. 470.

MILITARY LAW.

Persons belonging to the regular army are always subject to military law and regulations, and they are obliged to obey orders which their superiors give them, the sole condition being that such orders relate to military affairs, and are not so evidently illegal that

they lead to the belief that the person giving them is mentally incompetent. 2. It is otherwise in the case of those who belong to the volunteer militia; they are not subject to military law and regulations, and are only obliged to obey their superiors in the cases expressly enumerated in the Militia Act. Outside of such cases they are only ordinary citizens, and their superiors have no more right to give them orders than they have to give orders to persons who do not belong to the militia. 3. A militia officer who causes to be illegally arrested a man who belongs to the militia, makes himself liable to damages: *Cole v. Cooke*, Q. R. 12 K. B. 519.

The expression "military law" includes the Militia Act, and any orders, rules and regulations made thereunder, the Queen's Regulations and Orders for the Army; any Act of the United Kingdom, or other law applying to Her Majesty's troops in Canada, and all other orders, rules, and regulations of whatever nature or kind soever to which Her Majesty's troops in Canada are subject.

Every one who is bound by military law to obey the lawful command of his superior officer is justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful.

2. It shall be a question of law whether any particular order is manifestly unlawful or not.

Where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities, and the mere fact that some of the ordinary Courts are open is not sufficient to constitute a time of peace, and thereby to exclude the operation of martial law: *Maraïs (D. F.) v. General Officer Commanding the Lines of Communication*, 71 L. J. P. C. 42; (1902) A. C. 109; 85 L. T. 734; 50 W. R. 273.

Under the Petition of Right a state of peace is the necessary condition of the illegality of unconstitutional procedure.

The law recognises a state of peace and a state of war, but knows nothing of an intermediate state which is neither one thing or the other; and though the effect of war is to dissolve contracts and put an end to commercial relations between the subjects of belligerent powers, the actual existence and not the mere imminence of war at the time of the creation of the contract is necessary to bring about such a result. It is for the State and its rulers and not for private individuals to set up a standard and to determine questions of public policy. In these matters the individual must conform to the rule and guidance of the State: *Janson v. Driefontein Consolidated Mines*, 71 L. J. K. B. 857; (1902) A. C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268.

Service in the army or in colonial contingents incorporated with the army is service under the King, and the King is paymaster, whether the supplies are granted by the Imperial or a Colonial Legislature: *Williams v. Howarth*, 74 L. J. P. C. 115; (1905) A. C. 551; 93 L. T. 115; 21 T. L. R. 670.

Where goods supplied to a volunteer regiment are ordered by or on behalf of the officer commanding, that officer is personally liable for their price: *Samuel v. Whetherly*, 76 L. J. K. B. 357; (1907) 1 K. B. 709; 96 L. T. 552; 23 T. L. R. 280.

Where troops are summoned by Justices of a county to aid in the suppression of apprehended riots the county council cannot be called upon to pay out of the county fund the expenses of housing and feeding them: *Reg. v. Glamorganshire County Council*, 68 L. J. Q. B. 1047; (1899) 2 Q. B. 536; 81 L. T. 372; 48 W. R. 112; 64 J. P. 115.

MISTAKE.

In order to secure the rectification of an instrument, the clearest evidence is required to be adduced. If the Court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties gauging the credibility of witnesses, paying due regard to their interest in the subject-matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it: *Clark v. Joselin*, 16 O. R. 68.

Money paid under compulsion of law cannot be recovered: *Moore v. Fullen Vestry* (1895), 1 Q. B. 399.

The rule is, that to entitle a party to set aside or vary a deed on the ground of misrepresentation by another party to it, the evidence thereof must be the strongest possible; and where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach and does not choose to do so, he will not, on the facts turning out to be different from what they were represented, be entitled to any relief: *Coates v. Bacon*, 21 Chy. 21.

The principle established by *Steven v. Benning* (1854), 1 Kni. 168; *Reade v. Bentley* (1857), 3 K. N. J. 271; and *Hole v. Bradbury* (1879), 12 Ch. D. 886, that a publishing agreement between an author and a publisher or a firm of publishers is personal to the individuals entering into it; and after the benefit of such an agreement is not assignable without the other's consent, applies equally to the case of a similar agreement between an author and a limited company: *Griffith v. Jones Publishing Co.* (1891), 1 Ch. 21.

To induce a Court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only, the evidence of such intention must be of the clearest, most conclusive, and unquestionable character: *McMicken v. Ontario Bank*, 20 S. C. R. 548.

The Court will, in a proper case, order a deed to be cancelled, or if registered, a conveyance of the estate to the person properly entitled; and that, although his title may be such that he would succeed in defending any action against him at law: *Harkin v. Rabidon*, 7 Chy. 243.

In order that a deed may be reformed by the Court there must be at least two things established, namely, an agreement differing from the document well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement, and a mutual mistake of the parties by reason of which such agreement was not properly expressed in the deed: *Meneil v. Haines*, 17 O. R. 479.

A voluntary deed will not be reformed against the grantor: *Bellamy v. Badgerow*, 24 O. R. 278.

Where there was a contract for the sale of a reversion, and the deed purported to relinquish and quit claim the property with no other words of transfer, the Court held that in order to remove any doubt, the vendee was entitled to have proper technical words introduced: *Collver v. Shaw*, 19 Chy. 599.

The Court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted to a purchaser for value: *Ross v. Fox*, 13 Gr. 683.

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where by error of both parties, and without fraud or deceit, there has been a complete failure of consideration, a Court of Equity will rescind the contract and compel the vendor to return the purchase money: *Cole v. Pope*, 29 S. C. R. 291.

To induce the Court to vary a written instrument, on the ground of alleged mistake, the evidence must be of the strongest character: *Williams v. Felker*, 7 Chy. 345.

A Court of Equity will not give relief by way of rectification of a written agreement, merely on the ground that one of the parties misunderstood its true construction and legal effect at the time of execution. Every party to a contract has a right to assume that the other parties intend it to operate according to the proper sense of the words in which it is expressed: *Campbell v. Edwards*, 24 Chy. 152.

Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement, unless mistake is expressly charged: *McDonald v. Rose*, 17 Chy. 657.

A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have: *Cousineau v. City of London Fire Ins. Co.*, 12 P. R. 512.

The mistake of one party to an agreement for the purchase of land as to the amount of land purchased, when the mistake is not known to the other party, and there is nothing in the language or conduct of the other party which led or contributed to the mistake, does not give a right of rescission unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to do so: *Tamplin v. James*, 15 Ch. D. 215, and *Miller v. Dahl*, 9 Man. L. R. 444, followed. 2. If a purchaser of land enters into and retains possession of the land and pays two monthly instalments of the purchase money after he has found out his mistake, he should be held to have elected to affirm his contract, and cannot afterwards have it rescinded: *Slouski v. Hopp*, 15 Man. L. R. 548, 2 W. L. R. 363.

A stipulation contrary to the real intention of the parties having been inserted in a conveyance without the knowledge of the parties to the conveyance or through a misapprehension as to its effect, a party can have the conveyance rectified where it would be against equity and good conscience for the other party to retain the benefit: *Lawson v. Jones*, 40 N. S. R. 303.

Where a deed has been executed in pursuance of and in conformity with a previous agreement in writing come to between two parties, the Court will not rectify the deed on the ground that due effect has not been given to the intention of the parties. *May v. Platt* (60 L. J. Ch. 357; (1901), 1 Ch. 616), and *Davies v. Fitton* (2 Dr. & W. 225), followed: *Thompson v. Hichman*, 76 L. J. Ch. 254; (1907), 1 Ch. 550; 96 L. T. 454; 23 T. L. R. 311.

NOTICE.

See also PURCHASE WITHOUT NOTICE, page 575.

It is not true as a general proposition that the knowledge of a fact which comes to a person as secretary of one company is notice of the fact to him as secretary of another company from the mere existence of the common relationship. The question in such a case is whether or not the information he receives as secretary of one company is received by him under such circumstances that it would be his duty to communicate it to the other company: *Fenwick, Stobart & Co., In re; Deep Sea Fishery Co., Ex parte*, 71 L. J. Ch. 321; (1902), 1 Ch. 507; 86 L. T. 193; 9 Manson, 205.

NOVATION.

When A. is indebted to B., and C. is indebted to A., and the three parties meet together, and A. agrees that C. shall pay B. the amount due by him to A., which C. agrees to do, A. cannot afterwards revoke such order: *Mitchell, et al., v. Turnbull, et al.*, 2 Thom. 250 (N.S.). A new contract by novation cannot be created without the assent of the original creditor: *Anderson v. Fawcett*, vol. 19, 34. See S. C. C. Rep. Appeal allowed 22nd June, 1885.

Where services have been performed by one person for the benefit and at the request of another, and have been charged to the latter, the fact that a third person has had judgment recovered against him therefor, by the person rendering them, will not prevent the latter recovering in an action against the person liable in the first instance, unless the subsequent agreement amounts to a novation: *Herod v. Ferguson*, 25 O. R. 565.

Where A. has a contract with B., and B. takes C. into partnership and gives A. notice, A. has an option whether he will abide by his contract with B. alone or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable for a fraud committed by B. against A. in the respect of the contract, though B. was acting within the scope of the partnership business: *British Holmes Assurance Corporation v. Patterson*, 71 L. J. Ch. 872; (1902), 2 Ch. 404; 86 L. T. 826; 50 W. R. 612.

Where the liability of the retired partner is one resting not on estoppel only, but the firm of which he was a member is the actual debtor, it is necessary to make out a case of novation in order to discharge the retired partner: *Scarf v. Jardine* (1882), 7 App. Cas. 345, distinguished. *McKim v. Bixel*, 19 O. L. R. 81.

OPTION.

A provision in a lease whereby the lessor grants to the lessee an option to purchase the leased property within a limited time, is not a *nudum pactum*. Such an option is within the time limited binding on a deceased lessor's personal representatives though not so expressed. Statements, whether written or orally made by the lessor as to the terms of the lease, are not after the death of the lessor admissible as evidence in favour of his successor in title, as being declarations against the deceased's interest: *Yuill v. White*, 5 Terr. L. R. 275.

PAYMENT.

Most usual way of proving payment is by producing receipt. To an agent or by an agent, good.

In general, the party who pays money has a right to direct the application of it; but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to whichever of those demands he pleases: *Clayton's Case*, 1 Mer. 572. In some instances, and in the absence of any proof of special appropriation, the law will direct or presume the application of money paid generally. Appropriation is a question of intention: see *Griffith v. Crocker*, 18 A. R. 370. Of this nature are accounts current with bankers and others, where there are various items of debt on one side and credit on the other, occurring at different times, and no special appropriation is made by the parties; successive payments will then be applied to the discharge of antecedent debts in the order of time in which they stand: *Kinnaird v. Webster*, 10 Chy. D. 139.

There is a distinction between cases where payment is made by bill or note payable to bearer in exchange for goods sold at the time, and those where such a bill or note is given for a pre-existing debt. In former case, barter with risks; in latter case, not so.

The legal effect of accepting on account of a debt a bill or note not treated as cash is that of a conditional payment. It implies an agreement to suspend the remedy except in the case of specialty debts or rent, in which last cases no such implication is held to arise.

A payment may be made by mere transfer of figures in an account: *Eyles v. Ellis*, 4 Bing. 112. If goods be accepted in satisfaction of a debt, this constitutes payment: *Cannan v. Wood*, 2 M. & W. 465. Effect of payment into Court: *Patton v. Laidlaw*, 26 O. R. 189. "Payment of money to a creditor" under R. S. O. 1897, c. 147, s. 3, s.-s. 1: *Armstrong v. Hemstreet*, 22 O. R. 336; overruled, *Davidson v. Fraser*, 23 A. R. Bankers to whom as agents a bill of exchange is forwarded for collection can receive in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor: *Donogh v. Gillespie*, 21 A. R. 292. Effect of payment by cheque: *Sawyer v. Thomas*, 18 A. R. 129. A party receiving a cheque to be applied in a particular way cannot afterwards apply it otherwise, even though he may not have given a receipt: *Canada Paper Co. v. Bartley*, 9 U. C. C. P. 290. Appropriation of payments is to be made (1) as the debtor directs at the time of payment; (2) when there is no direction by the debtor as the creditor directs; (3) when either makes any direction then the law will apply it to the older debt, or as may be just: *Wilson v. Rykert*, 14 O. R. 188. Where a creditor takes security for an existing indebtedness and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging

notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness: *Griffith v. Crocker*, 18 A. R. 370. Where defendant is making payments on a loan, the plaintiff will insist in the absence of any agreement that the payments be applied first to keep down the interest: *McGregor v. Gaulin*, 4 U. C. R. 378. A cheque operates as payment until it has been presented and payment refused. In this case on the evidence set out in the report it was held the plaintiff had received the cheque as payment, and the jury having found otherwise, a new trial was granted: *Hughes v. Canada Permanent Building and Savings Society*, 39 U. C. R. 221. The retainer of an attorney or solicitor to collect a demand and to take such proceedings as he may deem proper to effect this object, gave him authority to receive the amount before or after suit and to discharge effectually the party making the payment: *Moody v. Tyrell*, 6 P. R. 313. An authority by plaintiff to his attorney to collect the interest due on a mortgage in the plaintiff's and not in the attorney's possession does not entitle the attorney to receive payment of the principal: *Palmer v. Winstanley*, 23 U. C. C. P. 586. Where a testator gives a legatee an absolute vested interest in a defined fund, the Court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period. *Roche v. Roche*, 9 Beav. 66, followed: *Goff v. Strohm*, 28 O. R. 553. Payment under protest of disputed taxes in order to avoid summary execution does not preclude the party from afterwards taking proceedings to have the assessment quashed. Judgment appealed from (N. B. Rep. 591), reversed: *Ex parte Lewin*, 11 S. C. R. 484. The party having a lien on land cannot under the Manitoba Interpleader Act claim money paid to sheriff as against an execution creditor: *Federal Bank of Canada v. Canadian Bank of Commerce*, 13 S. C. R. 384.

Land belonging to a trust estate having been sold for taxes, during the year allowed for redemption the trustee, who had been newly appointed, paid the taxes for the current year in ignorance of the sale, and subsequently on learning the fact decided not to redeem, as the arrears exceeded the value of the land: Held, that they were not entitled to recover back the money as paid under a mistake of fact: *Trusts Corporation of Ontario v. City of Toronto*, 30 O. R. 209.

A contract for life insurance is complete on delivery of the policy to the insured, and payment of the first premium. Where the insured, being able to read, having ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, neglects to do so, he cannot after paying the premium be heard to say that it did not contain the terms of the contract agreed upon: *Mowat v. Provident Savings Life Assurance Society*, 32 S. C. R. 147.

PURCHASE WITHOUT NOTICE OF REGISTRY TITLE.

On this defence see R. S. O. 1897, c. 119, s. 33 (purchaser for value without notice), and R. S. O. 1897, c. 121, s. 33, purchaser of mortgage.

For purposes of registration of deeds the North-West Territories are divided into districts, and it is provided by Ordinance that registration of a chattel mortgage not followed by transfer of possession shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are moved into another district, a certified copy of the mortgage shall be filed in the registry office thereof within three weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc.: Held, reversing the judgment in appeal that the "subsequent purchaser" in such case must be one who purchased after the expiration of the three weeks from the time of removal, and that though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period: *Hulbert v. Peterson*, 36 S. C. R. 324.

A plea of purchase for value without notice cannot be set up against the Crown: *Attorney-General v. McNulty*, 11 Chy. 281.

The execution and registration in accordance with the R. S. O. (1877), c. 111, ss. 9, 67, of a discharge of a mortgage in fee simple made by a tenant in tail, re-conveys the land to the mortgagor barred of the entail: *Lawlor v. Lawlor*, 10 S. C. R. 194.

Quære, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before: *In re Allan*, 10 O. R. 110.

In the case of a registered title actual notice of the title of an adverse claimant is required to affect the grantee holding under a registered instrument. The mere fact that such adverse claimant is in actual possession of the land is not sufficient notice, nor will it be actual notice if the grantee is aware of the fact that a person other than his grantor is in possession: *Roe v. Braden*, 24 Chy. 589.

The plaintiff purchased land from J., who had purchased from G., no conveyance having been made to J. by G., who afterwards conveyed to T., a son of the plaintiff, who mortgaged the property and represented it as his own, the plaintiff being all the while in possession. The title was not a registered one: Held, that the mortgagees were effected with notice of plaintiff's title by reason of his possession, although there was no pretence of actual notice to them, and they having omitted to set up the registry laws as a defence, liberty was given them to apply for leave to do so if so advised. The rule that possession is notice of the title of the party so in possession considered and acted on: *Gump v. Conacher*, 15 Chy. 419.

The doctrine of consolidation of mortgages laid down in *Vint v. Paget* (1858), 2 D. & J. 611, and other cases to the same effect, has been too long established to be now overthrown.

Therefore, where an owner of different properties mortgages them to different persons, and the mortgagees afterwards become united in title, the holder of the mortgages has the right to consolidate them, and to be refused to be redeemed as to one without payment of the other of what is due to him of all, not only as against the mortgagor but also as against the person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties: *Pledge v. White* (1896), A. C. 187.

The rules once a mortgage always a mortgage, and that the equity of redemption of a mortgage "must not be clogged" are still in force; to the full extent of the meaning of them, that is that the mortgagor on payment of the debt secured by the mortgage is entitled to have a mortgaged property restored to him in its entirety unfettered and undiminished in value: *Rice v. Nokes & Co.* (1909), 2 Ch. 245, (1902) A. C. 24. See *Santley v. Wylde* (1899), 2 Ch. 474, where it was held that a mortgagee may stipulate in his mortgage deed for a collateral advantage for himself beyond the payment of the sum advanced and interest, and may enforce the bargain against his mortgagor, provided it is not unconscionable or oppressive. See also *Biggs v. Hoddinott* (1898), 2 Ch. 307. *Santley v. Wylde* was disapproved of, (1902) A. C. 24, *ut sup.*

General charge for value on all the existing property of the mortgagor is not void for uncertainty, if the property to which it attaches can be ascertained at the time of enforcement. Such a charge is not contrary to public policy: *In re Kelsey* (1899), 2 Ch. 530.

Held, following *Truesdale v. Cook*, 18 Chy. 532, and *Dynes v. Bales*, 25 Chy. 593, that the grantee in a subsequent conveyance registered before the registry of a previous conveyance from the same grantor, of which the grantor had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that the Court had power so to order upon such terms as seemed just: *Weir v. Niagara Grape Company*, 11 O. R. 700.

The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry office and found only two incumbrances registered against the property. Shortly afterwards the defendant completed his purchase, and having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make any further search he did not discover the plaintiff's lien: Held, that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien. The

Registry Act does not preclude inquiry as to whether there was knowledge in fact; the Court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. *Brown v. McLean*, 18 O. R. 533, specially considered: *Abell v. Morrison*, 19 O. R. 669.

An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice; and he may be defeated by a deed made before, though registered after, the lodging of the execution in the hands of the sheriff: *Russell v. Russell*, 28 Chy. 419.

Though a plan not certified as required by the Registry Act, R. S. O. 1887, c. 111, s. 82, s.-s. 2, has even when deposited in the registry office no effect under the registry law, yet in a deed reference may be made to it as it may to any other document in the registry office or elsewhere, for the description or designation of a lot: *Ferguson v. Winsor*, 10 O. R. 13. See S. C. 11 O. R. 88.

To postpone a registered title on the ground of notice of a deed having been previously executed, though not registered, the evidence of notice must be quite satisfactory and distinct: *Hollywood v. Waters*, 6 Chy. 451.

Where a mortgage was created by the deposit of mortgages, and the borrower signed a memorandum stating the sum lent and times for repayment and agreeing to execute a writing to enable the lender to transfer or control the mortgages so deposited: Held, that this memorandum did not require registration, not being in the language of C. S. U. C. c. 89, s. 17, "a deed, conveyance or assurance affecting lands:" *Harrison v. Armour*, 11 Chy. 303.

As against a purchaser for value, a voluntary deed, though registered, is void, and as this objection will avail the purchaser in any proceedings adopted by or against him, the Court will not interfere to remove the registration of the void deed as a cloud on the title: *Buchanan v. Campbell*, 14 Chy. 163.

A conveyance by an heir-at-law for a nominal consideration registered prior to will: Held, not to cut out the will: *Wilkinson v. Conklin*, 10 U. C. P. 211.

The rule of equity which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts, and insist on being redeemed in respect of all before releasing any one of his securities, is not "tacking," and is not such a claim as the Registry Act declares should not be allowed to prevail against the provisions thereof: *Dominion S. and J. Society v. Kilbridge*, 23 Chy. 631.

A registered purchaser buying, with actual notice of an unregistered deed of an unascertained part of the land, takes subject to whatever such deed conveyed; and if he choose to purchase without proper inquiries as to its contents, his erroneous supposition as to the land thereby conveyed, or his ignorance of the names of all the persons interested under the deed, does not vary the case: *Severn v. McLellan*, 19 Chy. 220.

The rule that a mortgagee shall not be redeemed in respect of the mortgage without being redeemed also as to another mortgage, applies as well in a suit to foreclose as to redeem. In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage, which was registered after it but without notice thereof. On a sale of the lands embraced in another mortgage, a loss was sustained by the mortgagee: Held, that the defendant, the mortgagee, had not the right as against the plaintiff to consolidate his mortgages and make good the loss on the one out of the surplus of the other sale, the policy of the Registry Act being to give no effect to hidden equities: *Johnson v. Reid*, 29 Gr. 293.

The only instruments executed before patent which can be registered are such as create a mortgage, lien or incumbrance on the land: *Holland v. Moore*, 12 Chy. 296.

A vendor does not complete his title until his deed is registered, i.e., registration is essential to the title: *Laird v. Paton*, 7 O. R. 137.

Severance of one lot by conveyance by owner of two lots implies grant of easement over the adjoining lot: *Israel v. Leith*, 20 O. R. 361. A municipal council builds a sewer through land with oral consent of owner. A purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act. *Jarvis v. Toronto*, 21 A. R. 395, referred to: *Ross v. Hunter*, 7 S. C. R. 289. The earlier cases were: *Bell v. Walker*, 20 Chy. 538; *Grey v. Ball*, 23 Chy. 390; *Miller v. Brown*, 3 O. R. 210. See also *Pierce v. Canada Permanent*, 24 O. R. 426, which postponed to a second mortgage advances made to the mortgagor under a building mortgage prior in time to the second mortgage. This state of the law was remedied by statute, 1894 (Ont.), c. 34 (now R. S. O. 1897, c. 136, s. 99), but see the cases cited in *Hutson v. Valliers*, 19 A. R. 161. There are two cases where the doctrine applies. (1) Where the party charged has notice that the property in dispute is encumbered or in some way affected in which he is deemed to have notice of the facts and instruments, to a knowledge of which he would have been led by due enquiry after the fact he actually knew. (2) Where the conduct of the party charged evinces that he had a suspicion of the truth and wilfully or fraudulently determined to avoid receiving

actual notice of it: *Moore v. Kane*, 24 O. R. 548. To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent is indispensable (see 33 N. B. Rep. 310): *New Brunswick Ry. Co. v. Kelly*, 26 S. C. R. 341. Held, affirming the judgment appealed from (7 B. C. Rep. 12, *sub. nom. Kirk v. Kirkland*), that a certificate of title issued on registration of a deed from the assessor of taxes issued to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with: *Johnson v. Kirk*, 30 S. C. R. 344. The provisions of section 94 of the Territories Real Property Act (R. S. O. c. 51), as amended by 51 Vict. c. 20 (D.), do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor: *Jellett v. Wilkie*; *Jellett v. Scottish, Ontario and Manitoba Land Co.*; *Jellett v. Powell*; *Jellett v. Erratt*, 26 S. C. R. 292. R. S. O. 1877, c. 111, s. 81, declares that "no equitable lien, charge or interest affecting land shall be deemed valid in any Court in this province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns." Held, that this section does not apply to a case in which the party registering such instrument has notice of the equitable lien, charge or interest, even though the same has been created by parol: *Rose v. Peterkin*, 13 S. C. R. 677. See S. C. *sub nom. Peterkin v. McFarlane*, 9 A. R. 429. *Semble*, that standing timber is within the provisions of the registry laws; and that the purchaser of a right to cut the same is affected by notice of the conveyance from the original owner, and a mortgage back from his vendee: *McLean v. Burton*, 24 Chy. 134.

Held, following *Truesdale v. Cook*, 18 Chy. 532, and *Dynes v. Balcs*, 25 Chy. 593, that the grantee in a subsequent conveyance registered before the registry of a previous conveyance from the same grantor, of which the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that the Court had power so to order upon such terms as seemed just: *Weir v. Niagara Grape Co.*, 11 O. R. 700. In the case of a registered title actual notice of the title of an adverse claimant is required to affect the grantee holding under a registered instrument. The mere fact that such adverse claimant is in actual possession of the land is not sufficient notice; nor will it

be actual notice if the grantee is aware of the fact that a person other than his grantor is in possession: *Roe v. Braden*, 24 Chy. 589. The relationship arising out of an agreement for the sale of land on payment of the purchase money, and the taking of possession by the purchaser, is that of trustee and *cestui que trust*, and as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the possession of the *cestui que trust*. The principle of the decision in *Warren v. Murray* (1894), 2 Q. B. 648, applied. A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that any other than the mortgagor is in occupation of the land, and without notice actual or constructive of any equitable right of the *cestui que trust*, is entitled to set up the Registry Act, which is retrospective, and to plead it if it is necessary to do so. *Bell v. Walker*, 20 Chy. 558, and *Grey v. Ball*, 23 Chy. 390, followed: *Building and Loan Association v. Papps*, 27 O. R. 470. The principle upon which the Registry Act proceeds is that a person acquiring land ought to see whether there is anything registered against the land he is about to acquire, and that he is assumed to search the registry for that purpose; but this does not apply to one who is not acquiring but parting with an interest in land, and registration is not notice in such a case: *Trust & Loan Co. v. Shaw*, 16 Chy. 446. A conveyance of devise of growing timber is within the Registry Act: *Ellis v. Grubb*, 3 O. S. 611. Approved in *Ferguson v. Hill*, 11 U. C. R. 530. Held, that the prior registration of a mortgage with a power of sale enabled the mortgagee in the proper exercise of such power to sell free from the claim of a purchaser under a prior unregistered conveyance: *Daniels v. Davidson*, 9 Chy. 173. A subsequent mortgagee who had not actual notice: Held, not bound by the registration of a prior mortgage, the memorial of which insufficiently described the premises: *Reid v. Whitehead*, 10 Chy. 446. The registration of a plan of a subdivision of a town lot, and sales made in accordance with it, do not constitute a dedication of the lanes thereon to the public: *In re Morton and City of St. Thomas*, 6 A. R. 323. Though a plan not certified as required by the Registry Act, R. S. O. 1877, c. 111, s. 82, s-s. 2, has even when deposited in the registry office no effect under the registry law, yet in a deed reference may be made to it as it may to any other document in the registry office or elsewhere for the description or designation of a lot: *Ferguson v. Winsor*, 10 O. R. 13. See *S. C.*, 11 O. R. 88. As against a purchaser for value a voluntary deed, though registered, is void; and as this objection will avail the purchaser in any proceeding adopted by or against him, the Court will not interfere to remove the registration of the void deed as a cloud on the title: *Buchanan v. Campbell*, 14 Chy. 163. Registration of a subsequent deed will not give priority over another unregistered deed from the same grantor prior in point of time unless a valuable consideration

for the former is proved. Mere production or registration of the instrument by the person claiming under it is not sufficient proof for this purpose: *Barber v. McKay*, 19 O. R. 46. M. having conveyed certain lands to the plaintiff, willed one-half of it to his nephew and the remaining half to others, and the nephew conveyed the whole to a purchaser for value without notice of the plaintiff's deed, both will and deed to this purchaser being registered before the plaintiff's deed: Held, that the registration of the will and of the deed prevailed over plaintiff's unregistered deed; as to the moiety devised plaintiff was entitled to hold this part under the deed from M. as against the devisees under the will: *McDonald v. McDonald*, 44 U. C. R. 291. In 1831 A. devised his farm to his widow in fee and left her in possession. The will was never registered; and shortly after the testator's death his eldest son and heir went into possession with the mother, and so continued until his mother's death in 1854; the son managing the farm and being reputed owner during this period. After his mother's death he was in sole possession, and in 1862 he mortgaged to a person who had no notice of the will or of the widow's title: Held, that the widow's heir could not claim the property against the mortgagee: *Stephen v. Simpson*, 15 Chy. 594, 12 Chy. 493. The Registry Acts do not apply to instruments executed previously to the grant from the Crown: *Casey v. Jordon*, 5 Chy. 467. The only instruments executed before patent which can be registered are such as create a mortgage lien or incumbrance on the land: *Holland v. Moore*, 12 Chy. 296. Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent: *Goff v. Lister*, 13 Chy. 406, 14 Chy. 451. A lease for four years with covenant for renewing for four years more: Held, not to require registration, actual possession having gone along with the lease; and such a lease though not registered was held valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor: *Latch v. Bright*, 16 Chy. 653. The doctrine of constructive notice and the defence of purchase for value, as applicable to this country, commented upon: *Henderson v. Graves*, 2 E. & A. 9. A purchaser though he may have had notice is entitled to the benefit of the position of the party under whom he claims, where such a party was a purchaser for value without notice: *Rogers v. Shortis*, 10 Chy. 243. In the case of a charge upon equitable property where the legal estate is outstanding, the defence of purchase for valuable consideration without notice is in general inapplicable, the rule being that all such charges take rank according to priority in point of time: *Utterson Lumber Co. v. Rennie*, 21 S. C. R. 218. Held, that the defendant in this case having notice of an actual travelled way across his land, was affected also with notice of the origin as well as of the existence of the right: *Dixon v. Cross*, 4 O. R. 465.

Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice: *Cameron v. Hutchison*, 16 Chy. 526. R. S. O. 1857, c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests. If the owner of land gives permission to the municipality to construct a drain through it, the municipality after the work has been done has an interest in the land to which the registry laws apply, whether the agreement conveys the property, creates an easement, or is a mere license which has become irrevocable; and if there has been no by-law authorizing the land to be taken, such interest is under the section invalid as against a registered deed executed by an assignee of the owner, a purchaser for value without notice. *Ross v. Hunter*, 7 S. C. R. 289, distinguished. Judgment in 21 A. R. 395, affirmed: *City of Toronto v. Jarvis*, 25 S. C. R. 237.

A legal purchaser for value will be postponed to a prior equitable encumbrancer, of whose charge he has had no notice, if he is guilty of such gross negligence as would make it unjust for him to be allowed to take up the position of a *bona fide* purchaser for value, and deprive some one else of his security.

It is not necessary that he should have been guilty of fraud, or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud: *Dictum* of James, L.J., in *Ratcliffe v. Barnard* (40 L. J. Ch. 777; L. R. 6 Ch. 652), to that effect, dissented from: *Oliver v. Hinton*, 68 L. J. Ch. 583; (1899), 2 Ch. 264; 81 L. T. 212; 48 W. R. 3.

It is not essential to the validity of a chattel mortgage to secure future advances that such advances should be made to enable the mortgagor to enter into business as well as to carry it on: *Goulding v. Deming*, 15 O. R. 201, followed. *Newlands v. Higgins, Re Great West Saddlery Co.*, 7 W. L. R. 59; 1 Alta. L. R. 118.

To make valid against creditors of the vendor a sale of timber to be cut down by him, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual and continued change of possession as in the case of other chattels: *McMillan v. McSherry*, 15 Chy. 133.

The facts that a bill of sale, on the face of it absolute, is in truth only a mortgage, and that the vendor after the sale is allowed to remain in possession of the goods, are badges of fraud to be weighed by a jury, not conclusive proofs of fraud: *Hunter v. Corbett*, 7 U. C. R. 75.

Held, that the fact that as to part of the consideration for their mortgage the defendants had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mortgage, R. S. O. 1877, c. 119, not requiring, as does the corresponding English Act, that the consideration should be truly expressed: *Marthinson v. Patterson*, 19 A. R. 188.

See also *Paterson v. Maughan*, 39 U. C. R. 371.

In stating the amount of indebtedness a fractional part of the sum was omitted. The mortgage was intended to secure \$5,066.74, but was drawn for \$5,000: Held, to be a security for \$5,000 on the principle of *Mader v. McKinnon*, 21 S. C. R. 645; *Hamilton v. Harrison*, 46 U. C. R. 627; *Marthinson v. Patterson*, 19 A. R. 188; *A. E. Thomas (Limited) v. Standard Bank*, 1 O. W. N. 382.

A sale of chattels by the grantee of a bill of sale under an express authority from the grantor will be treated by the Court upon the same principle as a sale by mortgagee under a power of sale, or as a sale by the Court under the Interpleader Rules. Where a bill of sale of the furniture and effects in a house provided for the payment of the principal sum advanced and interest by means of ten monthly instalments and after one instalment had been paid the grantor authorized and requested the grantee to sell the house and furniture and deduct whatever the grantor was liable to pay under the bill of sale, and the sale realized more than enough to pay the principal and interest due to date of sale, the grantee will not be entitled to claim any interest after the date of that sale: *West v. Diprose*, 69 L. J. Ch. 169; (1900), 1 Ch. 337; 82 L. T. 20; 48 W. R. 389; 64 J. P. 281; 7 Manson 152.

Where a chattel mortgage is taken to secure a debt, the time for payment may be extended beyond a year: *Kerry v. James*, 21 A. R. 338.

The affidavit of *bona fides* in a chattel mortgage taken to secure the mortgagee against his indorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing me, the said mortgagee therein named, against his indorsement of a certain promissory note for (sic), or any renewal of the said recited promissory notes:" Held, "that his indorsement" might be read "my indorsement," as this was clearly a clerical error, but that even with this correction, the clause remained vague and incomplete, and that the affidavit was therefore fatally defective: *Boldrick v. Ryan*, 17 A. R. 253.

Where, by virtue of an acceleration clause in a mortgage deed, Acceleration the whole of the mortgage money has become due by default of pay- tion clause ment of interest, and interest has been recovered for the whole by

the mortgagee against the mortgagor, in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside. The acceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties. Rules 359, 360 and 361, and the long form of the acceleration clause, R. S. O. 1887, c. 107, schedule B., s. 16, considered: *Wilson v. Campbell*, 15 P. R. 254.

The affidavit of *bona fides* attached to a chattel mortgage, duly executed and filed, stated that the mortgagor was justly and truly indebted to the mortgagee in a named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made. In an action by the assignee for the benefit of creditors of the mortgagor under a subsequent assignment, to set aside the mortgage: Held, reversing 27 O. R. 545, that the mortgage was valid: *Martin v. Sampson*, 24 A. R. 1.

An affidavit that the mortgage was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against—not saying against whom—Held, clearly not a compliance with the Chattel Mortgage Act: *Re Andrews*, 2 A. R. 24.

A chattel mortgage conveyed to the plaintiff the stock-in-trade of the mortgagor, which purported to be enumerated in a schedule, and was described as being on certain named premises. The schedule, after setting out the goods, proceeded: "And all goods . . . which at any time may be owned by the said mortgagor and kept in the said store for sale . . . , and whether now in stock or hereafter to be purchased and placed in stock: Held, that after-acquired stock, brought into the business in the ordinary course thereof, became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time when such stock was brought into the business; the equitable right of the mortgagee under such agreement attaching immediately on the goods reaching the premises: *Coyne v. Lee*, 14 A. R. 503.

In a bill of sale certain goods were described as "one brown stallion, two years old; one bay horse, eight years old; one black mare, nine years old:" Held, a sufficient description: *Corneill v. Abell*, 31 U. C. C. P. 107; *Boldrick v. Ryan*, 17 A. R. 253. See *Connell v. Hickock*, 15 A. R. 518.

Crops to be grown may be covered by a chattel mortgage and a chattel mortgage of "crops which may be sown during the currency of this mortgage," covers crops sown after the mortgage falls due but remains unpaid: *Canada Permanent Loan & Savings Co. v. Todd*, 22 A. R. 515.

The words "one single buggy" in a chattel mortgage: Held, not a sufficient description to satisfy R. S. O. 1877, c. 119, s. 23: *Holt v. Carmichael*, 2 A. R. 639.

Seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling-house, all the lumber and logs in and about the sawmill and premises of the said grantor, and all the blacksmith's tools now in possession of the said party of the first part, six cows and four stoves: Held, a sufficient description as to the household furniture, lumber and logs, and insufficient as to the other goods: *Rose v. Scott*, 17 U. C. R. 385.

A description of the goods as "being now on the premises occupied by the mortgagors in the town of Peterborough, being lot, &c.," and being composed of "one stumping machine, one prize buggy, one lumber waggon complete, &c.:" Held, sufficient as to all the goods, though the stumping machine and waggon were not on the premises: *Bertram v. Pendry*, 27 U. C. C. P. 371.

"One piano, Dominion make, numbered 2773," is a sufficient description in a bill of sale: *Field v. Hart*, 22 A. R. 449.

Semble, that a piano on board a vessel would not pass to a mortgagee under the words "with her boats, guns, ammunition, small arms, and appurtenances:" *St. John v. Bullivant*, 45 U. C. R. 614.

In a chattel mortgage made by M. & Co. the goods were described as "two sets of blacksmithing and one set of waggon maker's tools complete, together with all their floating capital, stock-in-trade, to the value of \$1,000, connected with the business they carry on in the said village of Waterdown, as waggon and carriage builders, general blacksmiths, etc., under the name and firm of M. & Co.:" Held, an insufficient description as regarded the tools: *Mason v. MacDonald*, 25 U. C. C. P. 435.

A mortgage to secure the plaintiff as indorser of notes not payable within a year:—Held, invalid: *May v. Security Loan & Savings Co.*, 45 U. C. R. 106.

A chattel mortgage, given to secure the mortgagee against his indorsements for a mortgagor, must shew on its face that the notes indorsed, or any renewals thereof, will fall due within the year, otherwise the mortgage will be void against the creditors or purchasers, but not against the assignee in insolvency: *Ontario Bank v. Wilcor*, 32 U. C. R. 460.

Boynton v. Boyd, 12 U. C. C. P. 334; *Heaton v. Flood*, 29 O. R. 87.

Where possession has been taken under default in the mortgage within a year from its filing, re-filing is not necessary: *Ross v. Elliott*, 11 U. C. C. P. 221.

Held, following *Porter v. Flintoft*, 6 U. C. C. P. 335, and *Ruttan v. Beamish*, 10 U. C. C. P. 90, that an action will not lie at the suit of the mortgagor of chattels, before default in payment, where there is no proviso in the mortgage for possession until default; and that even if an action would lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of wrong-doer: *McAuley v. Allen*, 20 U. C. C. P. 417.

A purchaser of goods who neglects to comply with s. 6 of the Bills of Sale Act cannot invoke its provisions as against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the Act, obtains priority: *Winn v. Snider*, 26 A. R. 384.

A formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands, but such conveyance, whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. 1877 c. 118, would not suffice to cure the defects: *Smith v. Fair*, 11 A. R. 755.

The owner of land upon which there are fixtures, such as machinery in a mill, has a right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was held not to be prejudiced by his subsequent mortgage of the land: *Ross v. Hope*, 22 U. C. C. P. 482.

The purchaser of a piano under a hire receipt (by which the property was to pass to him only on completion of certain payments on account), before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as required by the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148:—Held, that the transaction was invalid as against execution creditors under s. 37 of that Act, and was not within s. 41, s.-s. 4, which is intended to except only conditional sales of chattels within R. S. O. 1897, c. 149, which this was not:—Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her: *Eby v. McTavish*, 32 O. R. 187.

An immaterial variation between a chattel mortgage and the copy subsequently filed does not invalidate the re-filing. A mistake in the number of the lot where the chattels were, was held to be immaterial under the circumstances: *Walker v. Niles*, 18 Chy. 210.

Book debts are not within the Chattel Mortgage Act R. S. O. 1887, c. 125, and amending Act, 55 Vict. c. 26, and a transfer of them does not require registration: *Thibaudeau v. Paul*, 26 O. R. 385.

The mortgage covered growing crops:—Held, that such crops being incapable of delivery or change of possession without change of occupation of the land, the mortgage as to them was not within the Chattel Mortgage Act: *Hamilton v. Harrison*, 46 U. C. R. 127; *Laing v. Ontario Loan & Savings Co.*, 46 U. C. R. 114, explained; *Bloomfield v. Hellyer*, 22 A. R. 232; *Grass v. Austin*, 7 A. R. 511; *Cameron v. Gibson*, 17 O. R. 233.

An assignee for the benefit of creditors under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. 1887 c. 124, may renew a chattel mortgage made in favour of his assignor without the execution and registration of a specific assignment of that mortgage. A renewal statement in itself in proper form alleging title through the assignment for the benefit of creditors is sufficient: *Fleming v. Ryan*, 21 A. R. 39.

Oral lease of farm and chattels. Delivery and change of possession: see *Oliver v. Newhouse*, 8 A. R. 122.

It is not a question of law, but for the decision of a jury, under all the circumstances, whether there has been an immediate and continued change of possession sufficient to satisfy the statute: *Waldie v. Grange*, 8 U. C. C. P. 431.

Remarks upon the policy of the Chattel Mortgage Act: *Barker v. Leeson*, 1 O. R. 114.

The mortgage showed the debt in the proviso as only becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence shewed it was given to secure an overdue debt:—Held, that the mortgage could be upheld, regarding it as given for a present debt to be paid at a future day: *Farlinger v. McDonald*, 45 U. C. R. 233.

Where a bill of sale was made to two jointly, and filed on an affidavit of bona fides by one, but the evidence shewed that the consideration was made up of two bad debts, due to the vendees separately:—Held, sufficient. *McLeod v. Fortune*, 19 U. C. R. 100.

The decisions in the cases of grantors of bills of sale and chattel mortgages who remain in possession of the goods and sell them in the ordinary course of their business, as in *National Mercantile Bank v. Hampson*, 5 Q. B. D. 177, *Walker v. Clay*, 49 L. J. Q. B. 560, and *Dédrick v. Ashdown*, 15 S. C. R. 227, apply also in the case of claims under lien notes: *Brett v. Foorsen*, 7 W. L. R. 13, 17 Man. L. R. 241.

There is no longer objection to a loan being made by one member from the monies of a firm, and the taking as a security therefor a chattel mortgage himself: *Hobbs Hardware Co. v. Kitchen*, 17 O. R. 363.

Held, that where the first filing was on the 15th May, 1852, a re-filing on the 14th May, 1853, was clearly in time: *Armstrong v. Ausman*, 11 U. C. R. 498.

There being no re-demise clause or proviso in the mortgage whereby the mortgagor might have remained in possession until default, the Court was bound by the decisions in *McAuley v. Allen*, 20 U. C. C. P. 417, and *Samuel v. Coulter*, 28 U. C. C. P. 240, to hold that upon the execution of such mortgage the suppliants were entitled to immediate possession of the property granted thereby, and might if they had pleased at that time have exercised their right to sell thereunder without the mortgagor's intervention and consent: *Merchants Bank of Toronto v. The Queen*, 1 Ex. C. R. 1.

A mortgage of growing crops or crops to be grown cannot prevail over a prior execution in the hands of the sheriff against the goods of the mortgagor: *Clifford v. Logan*, 11 M. L. R. 423 (Man.).

A chattel mortgage covering growing crops, or crops to be grown, does not come within the provisions of the Bills of Sale Act, R. M. S. c. 10, so as to need filing under the Act to preserve its validity: *Clifford v. Logan*, 11 M. L. R. 423 (Man.).

When the transaction evidenced by an instrument in the form of an absolute bill of sale is in fact the giving of security for an existing debt, the parties cannot evade compliance with ss. 2 and 3 of the Bills of Sale Act, R. S. O. 1897 c. 148, merely by the form of the instrument. If, however, the real transaction is a sale with a right of re-purchase upon certain terms, the vendor can only be required to observe the provisions of s. 6: *Hope v. Parrott*, 7 O. L. R. 496.

Conditional Sales Act (R. S. O. 1897 c. 149) requires name and address of manufacturer to be stamped upon manufactured article. Construed strictly: *Mason v. Lindsay*, 4 O. L. R. 365; *Toronto Furnace Crematory Co. v. Ewing*, 1 O. W. N. 467.

The creditors against whom by section 4 of 55 Vict. ch. 26 (O.) taking possession under a defective chattel mortgage is declared to be of no avail, are creditors having executions in the sheriff's hands at the time possession is taken, or simple contract creditors who, at that time, have commenced proceedings on behalf of themselves and other creditors to set aside the mortgage, or an assignee for the general benefit of creditors, who, however, stands in no better position; and possession taken before the assignment cures all formal defects: *Gillard v. Bollert*, 22 A. R. 138.

RELEASE.

After breach a contract can only be discharged by release under seal or by accord and satisfaction.

Before breach it may be discharged by parcel.

Release of one of two joint or joint and several debtors is a discharge of all: *Nicholson v. Revill*, 4 A. & E. 675; but not so the release of one co-debtor, reserving remedies against the other: *Willis v. De Castro*, 27 L. J. C. P. 243; or a release of the principal debtor, reserving rights against a surety: *Bateson v. Gosling*, L. R. 7 C. P. 9.

An unqualified covenant not to sue has the effect of a release on the ground of avoiding circuity of action: *Ford v. Beech*, 11 Q. B. 853.

Fraud can only be relied on in reply to a release contained in a contract, when the plaintiff can disaffirm the contract and remit the defendant to his former state. See *Urguhart v. Macpherson*, 3 App. Cas. 821.

Release of one partner: *Allison v. McDonald*, 20 A. R. 695. (See under Guarantee.)

Quære, in the present state of the law is a release to or satisfaction from one of several joint tort-feasors a bar to an action against others? *Grand Trunk R. W. Co. v. McMillan*, 16 S. C. R. 543. A release by creditors to one of two partners of all actions and causes of action, suits, debts, etc., which they now have or ever had, or are entitled to in respect of any act, matter or thing, from the beginning of the world, is a release of individual as well as partnership liabilities: *Hall v. Irons*, 4 U. C. C. P. 351. A settlement of a pending action, agreed to by an illiterate plaintiff without communication with her solicitor, and without fair disclosure of facts, cannot stand, and its validity may be tried in the pending action if pleaded in bar: *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408. In an action by a creditor against an executrix *de son tort*, she cannot set-off a debt due from the plaintiff to her testator: *Cameron v. Cameron*, 23 U. C. C. P. 289.

The question whether at the time of the bringing of the action the person against whom a release is set up has done any act which has precluded him from impeaching it is one of fact depending on the circumstances: *Barnes v. Richards* (1902), 18 Times L. R. 328, 330. In *Hewson v. Macdonald*, 32 U. C. C. P. 407, the plaintiff was held to be concluded because the facts shewed a distinct election by him to retain the release and not disaffirm it. *Secus, Doyle v. Diamond Flint Glass Co.*, 10 O. L. R. 572. Followed in *Moore v. Scott*, 5 W. L. R. 8, 381; 16 Man. L. R. 492.

The rule that the release of one or two joint or joint and several debtors is the release of the other applies equally whether the obligation arises upon a judgment or upon any other security: *E. W. A. (a debtor)*, *In re*, 70 L. J. K. B. 810; (1901) 2 K. B. 642; 85 L. T. 31; 49 W. R. 642; 8 Manson 250.

REPUGNANCY OF STATUTE.

City and South London R. W. Co. v. London County Council (1891), 2 Q. B. 513, followed. *The St. Hyacinthe Case*, 25 S. C. R. 168, distinguished. *City of Victoria v. British Columbia Electric R. W. Co.*, 13 W. L. R. 336.

RESCISSION.

Before breach a simple contract may be rescinded and discharged by a mutual oral agreement.

A deed cannot be revoked or discharged by parol or writing not under seal: *West v. Blakeway*, 2 M. & Gr. 729.

An executory agreement in writing not under seal may, before breach, be discharged by a subsequent oral agreement. After breach it cannot be discharged except by release under seal or accord and satisfaction: *Willoughby v. Backhouse*, 2 B. & C. 824; or by a valid agreement, substituting a new cause of action in place of the old, for an invalid agreement will not discharge the former one: *Noble v. Ward*, L. R. 1 Ex. 117.

A distinction is to be observed between simple contracts in writing under the Statute of Frauds and contracts at the common law. In the former case an oral contract will not be admitted to show a subsequent variation in the written contract: *Goss v. Lord Nugent*, 5 B. & A. 58.

But it is otherwise if the contract is not subject to the control of a statute. Where such a contract has been reduced into writing it is competent to the parties at any time before the breach of it, by a new contract not in writing, either altogether to waive, dissolve or alter the former agreement, or to qualify the terms of it, and thus to make a new contract, to be proved partly by the written agreement and partly by the subsequent oral terms engrafted upon it: *Goss v. Lord Nugent*, 5 B. & A. 65.

A contract within the Statute of Frauds can, it seems, be wholly discharged orally: *Midland R. Co. v. Ontario Rolling Mills*, 10 A. R. 677. See *Hayes v. Elmsley*, 23 S. C. R. 623.

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where by error of both parties and without fraud or deceit there has been a complete failure of consideration, a Court of equity will rescind the contract and compel the vendor to return the purchase money: *Cole v. Pope*, 29 S. C. R. 291.

There is no ground for a demand for the rescission of a contract in course of execution, except when the debtor is actually in default as regards the fulfilment of the obligations which arise from it. Con-

sequently, the probability of his not being able to perform it within the time agreed upon, however strong that may be, and his default in accomplishing what is required by the contract, according to the mode or in the order provided, are not grounds sufficient to give the creditor the right to exercise this remedy: *Flood v. Larouche*, Q. R. 28 S. C. 271.

Effect of giving time to make good does not prevent reliance on misrepresentation as a ground for determining contract: *Tibbatts v. Boulter* (1895), W. N. 152 (4).

Option to purchase on notice: *Dibbins v. Dibbins* (1896), 2 Ch.

A contract sealed and delivered by one party, which is subject to the approval of the other party, cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent. Nominal damages only allowed against the defaulting party under the circumstances set out in the report: *Waterous Engine Works Co. v. Pratt*, 30 O. R. 538.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible. Held, that the defendants were liable for the damages thus sustained, and for the rent during the period of repair. *Taylor v. Caldwell*, 3 B. & S. 626, followed: *Grant v. Armour*, 25 O. R. 7.

Mere silence as regards a material fact, which one party is not bound to disclose to the other, is not a ground for rescission or a defence to specific performance: *Turner v. Green* (1895), 2 Ch. 205.

Letters accepting an open offer and withdrawing the offer were posted on the same day. The letter of withdrawal was received before the letter of acceptance: Held, that the withdrawal was too late.

An offer which is likely to be accepted by letter is accepted when the letter is posted, but the withdrawal of such an offer dates only from the time when the fact of the withdrawal is next to the other party: *Henthorn v. Fraser*, C. A. (1892), 2 Ch. 27.

Performance of a contract to employ a traveller for a fixed period is no excuse because the employer ceased to carry on business after destruction by fire: *Turner v. Goldsmith*, C. A. (1891), 1 Q. B. 544.

Notice to end contract. *Semble*, that when one party to a contract (in which time is not of the essence) desires to put an end to the contract in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end: *O'Keefe v. Taylor*, 2 Chy. 95.

Where no time is specified between the parties for the carrying out of a contract, the law implies that it should be carried out

within a reasonable time, having regard to all the circumstances. If there be an undue delay on the part of either party, the other party has the right to notify him that unless the contract is carried out within a specified time, such time to be reasonable, the contract will be considered at an end, and where the work to be done requires a considerable period of time he may also fix a reasonable time for its commencement: *Johnson v. Dunn*, 11 B. C. R. 372, 2 W. L. R. 317.

A judgment against the principal debtor is *res judicata* against his surety, provided that the judgment defines and determines the responsibility of the principal debtor in the matter covered by the security: *Morgan v. Western Assurance Co.*, Q. R. 13 K. B. 49.

The right of a purchaser to repudiate the contract on account of a defect in title which the vendor cannot remove is merely an equitable right arising out of want of mutuality and effecting the equitable remedy by way of specific performance, and is distinct from the legal right of rescission. The right of repudiation must be exercised as soon as the defect is ascertained; and if, after ascertaining it, the purchaser continues to treat the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose, and must give the vendor a reasonable time to cure the defect. Further, after a decree of specific performance a defendant purchaser cannot repudiate the title or the contract without the leave of the Court. If he discovers a defect of title which might, but for the decree, give rise to a right of repudiation he must move to be discharged from the contract, and he is not entitled to be discharged as a matter of course. The vendor may perfect his title at any time before certificate, while the purchaser is not confined to objections taken by him before or at the hearing, and in each case the Court will consider the circumstances and grant or refuse the relief as may appear to be equitable: *Halkett v. Dudley (Earl)*, 76 L. J. Ch. 330; (1907), 1 Ch. 590; 96 L. T. 539.

Where, in an agreement for conditional sale, it is provided that upon default the seller may take possession of and hold the goods until payment, or sell the same and apply the proceeds on the purchase price, and recover the balance, and the seller takes possession and retains the goods, the contract is not thereby rescinded, but he may recover the purchase price under the contract after crediting the value of the goods. *Harris v. Dustin*, 1 Terr. L. R. 404, and *Massey v. Lowe*, 1 W. L. R. 313, distinguished: *Hopkins v. Danroth*, 7 W. L. R. 303, 1 Sask. L. R. 225.

The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil, or escape those obligations by offering to the other party an indemnity which is not that which the other party

contracted to accept: *The Blairmore*, 67 L. J. P. C. 96; (1898) A. C. 593; 79 L. T. 217; 8 Asp. M. C. 429.

The question whether a breach of contract is of such a character as to justify the treatment of the contract as repudiated may, when it depends upon the construction of a written contract, be decided by the Judge without the jury: *George D. Emery Co. v. Wells*, 75 L. J. P. C. 104; (1906) A. C. 515; 95 L. T. 589.

Defendant wrote plaintiff that he had fifty tons of hay for sale, to be shipped by schooner. This being impracticable, defendant said he would ship by rail, which plaintiff accepted: Held, not a rescission, but a modification of the existing contract. Judgment for plaintiff. Appeal dismissed: *McGrath v. Black*, 6 E. L. R. 501.

Powers of rescission must be strictly followed and their exercise subjected to rigorous scrutiny in a Court of Equity just as in cases of notices under powers of sale in mortgages: Held, further, that, even if the notice served had been worded in strict accord with the power in the agreement, the latter should be treated as in the nature of a penalty against which the Courts will relieve: *In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, and *Cornwall v. Henson* (1900), 2 Ch. 298, followed. That the plaintiff's remedy would be to commence an action in the nature of specific performance to have the contract cancelled by decree of the Court, upon default after a time to be fixed by the Court: *Hudson's Bay Co. v. Macdonald*, 4 Man. L. R. 327, and *Lysaght v. Edwards*, 2 Ch. D. 506, followed. *Canadian Fairbanks Co. v. Johnston*, 18 Man. L. R. 589; 10 W. L. R. 571.

RES JUDICATA, see JUDGMENT, *ante* page 70.

SET-OFF.

Founded on 2 Geo. II., c. 22, s. 13; 8 Geo. II., c. 24, s. 45.

A defendant in an action may set up by way of counterclaim against the claim of the plaintiff any right or claim, whether the same sound in damages or not.

The distinction between a set-off and counterclaim is still material for some purposes, and especially with reference to costs. A set-off alleges a liquidated demand due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shews that on the whole account between the plaintiff and the defendant nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is, therefore, a defence to the action.

A counterclaim is in the nature of a cross action by the defendant, which may be made, although in respect of or against a claim for unliquidated damages: *Stooke v. Taylor*, 5 Q. B. D. 576.

Where the defendant succeeds on a simple set-off, or on a counterclaim founded on matters that would have been a defence prior to the Judicature Act, and to an amount not less than the plaintiff's claim, he has a complete defence to the action, and is therefore entitled to his costs. See *Stooke v. Taylor*, *ubi sup.*

Where, however, the counterclaim is in the nature of a cross-action, and the plaintiff is successful on his claim, and the defendant also on his counterclaim, the plaintiff is entitled, even although the defendant recover the larger amount, to the general costs of the action. The defendant is entitled to the costs of the counterclaim; but there is no apportionment of such costs as, if the claim and counterclaim had been separate actions, would have been incurred in each of them: *Ward v. Morse*, 23 Chy. D. 377.

Where the claim and counterclaim are both dismissed with costs, the plaintiff pays the general costs of the action, and the defendant the amount only by which the costs have been increased by the counterclaim: *Sauer v. Bilton*, 11 Chy. D. 416. See *McGowan v. Middleton*, 11 Q. B. D. 464.

Where the issues in the claim and counterclaim are the same, the plaintiff is not entitled to adduce fresh evidence to contradict the defendant's evidence: *Green v. Sevin*, 12 Ch. D. 589. See *Monteith v. Walsh*, 10 P. R. 163; *Goring v. Cameron*, 10 P. R. 496; *Hare v. Cawthrope*, 11 P. R. 353. Followed in *Malcolm v. Race*, 16 P. R. 330; *Chamberlain v. Chamberlain*, 11 P. R. 501; *Central Bank v. Osborne*, 12 P. R. 160; *General Electric v. Victoria Electric*, 16 P. R. 529. Plaintiff by deed agreed to build a house for defendant for \$1,150 by a day named, and that for each day that should elapse after that day until completion defendant might deduct \$5 from the contract price: Held, that the sum of \$5 per day was liquidated damages, not a penalty, and that it might be deducted from the contract price without pleading it specially by way of set-off: *Scott v. Dent*, 38 U. C. R. 30.

The rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an illegal act: *Wier v. Blois*, 40 N. S. R. 266.

TENDER.

The following are the main requisites for a valid tender:

The actual production of the money due is necessary, unless the creditor dispense with the production of it at the time, or does any-

thing which is equivalent to a dispensation: *Thomas v. Evans*, 13 East 101.

There must be evidence of an unqualified offer. An offer of payment clogged with a condition that it must be accepted as the balance due does not amount to a valid tender: *Evans v. Judkins*, 4 Camp. 156.

Whether a tender is conditional or not is a question for the jury, where the words or facts accompanying it are disputed: *Eckstein v. Reynolds*, 7 A. & E. 80. But if the goodness of it turns on the meaning or legal effect of a letter or writing accompanying it, then the question is for the Judge: *Bowen v. Owen*, 11 Q. B. 130.

The same rule would apply to unwritten expressions used by the party tendering, where the tenor of them is not disputed. The tender need not be made by the debtor himself; it is sufficient if made by his agent. A tender to a person authorized by the creditor to receive money for him is sufficient. Tender of a part of one entire debt is inoperative: *Dixon v. Clark*, 5 C. B. 365.

If a man tenders more than he ought to pay, it is good: *Wade's Case*, 5 Rep. 114.

But such a tender is only good where it is made in moneys numbered so that the creditor may take what is due to him; therefore, e.g., a tender of a Dominion note for fifty dollars, requiring change, is not good.

By R. S. C., c. 31, "An Act respecting Dominion Notes," such Dominion notes are authorized. Section 4 provides:—

"Such notes shall be a legal tender in every part of Canada except at the offices at which they are respectively made payable."

By R. S. C., c. 30, "An Act respecting the Currency," gold coins may be struck for Canada of the standard of fineness prescribed by law for the gold coins of the United Kingdom, and bearing the same proportion in weight to that of the British sovereign as \$5 bear to \$1.8623. These coins shall pass current and be a legal tender in Canada for \$5.

Silver, copper or bronze coins are legal tender as follows: Silver coins to the amount of \$10; copper or bronze coins to the amount of twenty-five cents in any one payment. The holder of the notes of any person to the amount of more than \$10 shall not be bound to receive more than that amount in such silver coins in payment of such notes if presented for payment at one time, although any of such notes is for a less sum.

The defence of tender is only applicable to cases where the party pleading has been guilty of no breach of his contract.

The defence will be defeated by shewing a demand and refusal prior or subsequent to the tender: *Bennett v. Parker*, L. R. 2 C. L. 89, Ex.

Although a conditional tender is not good, the tender under protest reserving the right to the debtor to dispute the amount due is a good tender if it does not impose any conditions on the creditor: Held, that a tender to mortgagees in possession, reserving a right to tax their costs and review their account, was a good tender: *Greenwood v. Sutcliffe*, C. A. (1892), 1 Ch. 1.

An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and if his right of redemption is not affected or the value of the mortgaged property impaired, he cannot complain. *Bristol and West of England Co. v. Taylor*, 24 O. R. 266, distinguished: *Trust and Loan Company v. McKenzie*, 23 A. R. 167.

A tender of mortgage money with a statement that the party tendering did not consider the amount tendered due, and that the other would be compelled to repay the excess: Held, not invalidated by the statement: *Peers v. Allen*, 19 Chy. 98.

The demand must be proved of the precise sum tendered: *Rivers v. Griffiths*, 5 B. & A. 630. See *Demorest v. Midland*, 10 P. R. 640; *Lockridge v. Lacey*, 30 U. C. R. 494; *Long v. Long*, 17 Chy. 251.

An action for distraining for more rent than is due cannot be maintained without a tender of the sum which is really due; and the excess paid cannot be recovered back as money had and received: *Owen v. Taylor*, 39 U. C. R. 358. To divest a landlord of his right to distrain a strict legal tender must be shewn: *Matheson v. Kelly*, 24 U. C. C. P. 598.

A tender in bank notes is good though the notes are not legal tender, if the tender is not objected to on that account: *Stewart v. Freeman*, 2 N. B. Eq. Reps. 451.

Proof of tender of the purchase in an action for specific performance is unnecessary if the vendor, by his conduct, renders tender unnecessary: *Maloney v. Whitlock*, 7 W. L. R. 460; 1 Sask. L. R. 41.

TRADE CUSTOM.

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests required them to have knowledge of its existence, and in any case the terms of a bill of lading inconsistent with and repugnant to the custom of a port must prevail against such custom: *Parsons v. Hart*,

30 S. C. R. 473. Evidence of a usage contrary to a settled principle of law is not admissible: *Hardy et al. v. Fairbanks et al.*, James, 432 (N.S.). Where goods are sold by sample the place of delivery is in the absence of a special agreement to the contrary the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase. Evidence of mercantile usage will not be allowed to add to or to affect the construction of a contract for sale of goods, unless such custom is general: *Trent Valley Woolen Mfg. Co. v. Oelrichs*, 23 S. C. R. 682. Where a cargo insured "at and from Arichat to Halifax" was shipped at Petit de Grat, a port nearer to Halifax, and distant nine miles from Arichat by water and one and one-half miles by land, and which by the usage of trade in Richmond, the county wherein both ports are situate, appeared to be generally considered and treated by merchants there and by the masters of coasting vessels in Isle Madame, the large island wherein said ports are situate, and also partly by merchants in Halifax, as one and the same port with Arichat; the custom house for both ports was at Arichat, and the vessel and cargo were lost shortly after the vessel left Petit de Grat: Held, that this usage did not bind underwriters unless known to or acquiesced in by them; and no evidence of such knowledge or acquiescence having been given, that the policy never attached, and the underwriters therefore were not liable. Usage must be proved by instances and not by the opinion of witnesses: *Hennessey v. New York Mutual Marine Ins. Co.*, 1 Old. 259 (N.S.).

As to evidence of a custom or trade usage: *Northern Elevator Co. v. Lake Huron and Manitoba Milling Co.*, 13 O. L. R. 349.

The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful or ambiguous: *Dufresne v. Fee*, 35 S. C. R. 274.

An allegation of a custom and commercial usage is good in law especially when it is alleged that this custom and usage have always been accepted by the parties in their business dealings and particularly in the transaction which was the basis of the action: *Laflamme v. Dandurand*, Q. R. 26 S. C. 499.

Held, following *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, that pleas setting up a custom for inhabitants of the surrounding country as of right to drink the water of certain mineral springs for forty years were bad, for such right could not be claimed in gross under the Prescription Act, R. S. O. 1877, c. 108, s. 38. *Scmble*, that, apart from the statute, the alleged custom was bad, as being too large, and not confined, either in the pleas or in the evidence, to any particular class of persons: *Grand Hotel Co. v. Cross*, 44 U. C. R. 153.

Quere, whether a custom could be proved in this Province, there being no time immemorial on which to found it, especially where, as here, the land sought to be burdened therewith was only granted by the Crown within fifty years: *Ib.*

In the case of a river traversed annually by thousands of vessels, and used by two nations, a custom which in effect supersedes a statutory rule ought to be established by the most conclusive and cogent proof; and when it is sought to make it binding on foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed among mariners generally, and extended to mariners sailing on vessels carrying a foreign flag and habitually traversing a busy river: *Georgian Bay Navigation Co. v. The "Shenandoah" and The "Crete,"* 8 Ex. C. R. 1.

A ship-owner is under no duty either at common law or under s. 207 of the Merchants' Shipping Act, 1894, to provide surgical or medical attendance for the ship's company: *Morgan v. British Yukon Navigation Co.,* 10 B. C. R. 112.

Evidence of custom in foreign countries rejected where the contract was made in Ontario: see *Williams v. Corby,* 5 A. R. 626.

Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to a customary right of the away-going crop is excluded; and *semble*, that there is no custom of the country as to the away-going crops in Upper Canada: *Burrowes v. Cairns,* 2 U. C. R. 288.

The construction of a mercantile contract is for the Court, unless it contains words of a technical or conventional use in the trade to which the contract relates: *Nordheimer v. Robinson,* 2 A. R. 305.

A trade custom in order to be binding upon the public generally must be shewn to be known to all persons whose interest required them to have knowledge of its existence, and in any case the terms of a bill of lading inconsistent with and repugnant to the custom of a port must prevail against such custom: *Parsons v. Hart,* 30 S. C. R. 473.

To incorporate mercantile usages with the terms of a contract, or to prove that they form the basis of it, they must be such as attach universally to the subject matter of the contract in the neighbourhood or place where it was made. If a local custom or usage of a particular place or class of persons be relied on, it must be shewn that the parties knew the custom, as it is not binding on those who are ignorant of it. The evidence of the usage must be "clear, cogent and irresistible:" *Burke v. Blake,* 6 P. R. 260.

Where there is a stipulation in a lease for a term certain, that the lessee shall deliver up all the lands at the expiration of the lease, all question as to a customary right of the away-going crop is ex-

cluded; and *semble*, that there is no custom of the country as to the away-going crops in Upper Canada; *Burrows v. Cairns*, 2 U. C. R. 288.

TRUST, DECLARATION OF.

Among other claims in this action the plaintiff asked to have it declared that the purchase made by the defendant of a lot of land was made by him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits, and an account. There was no writing evidencing the alleged trust: Held, that the plaintiff was at liberty to prove by parol evidence (if he could do so), the existence of the alleged trust. The authorities are conflicting. *Bartlett v. Pickersgill*, 1 Cox 15, 1 Eden 515, 4 East 577; *Heard v. Pillop*, L. R. 4 Ch. 548; *James v. Smith* (1891), 1 Ch. at p. 387, and *Rocheffoucauld v. Boustead* (1897), 1 Ch. 196, discussed. Held, however, that the evidence in this case failed to prove the trust: *Hull v. Allen*, 22 Occ. N. 138.

Where a gift is made to A. and C. as joint tenants upon an alleged secret trust, there is a distinction between these cases in which the will is made on the faith of an antecedent promise by A., that he will carry out the testator's wishes, and those cases in which the will is left unrevoked and on the faith of a subsequent promise by A. In the former case the trust binds both A. and C., in the latter case A. and not C. is bound: *In re Steed* (1900), 1 Ch. 287.

See also *Sims v. Landry* (1894), 2 Ch. 318.

UNDUE INFLUENCE.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness or wildness, or want of care, and when the facts shew that one party has taken an undue advantage of the other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand: *Waters v. Donnelly*, 9 O. R. 391.

Although the number of persons in this country in the position of expectant heirs and reversioners is small, still the same rule applies as in England; the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men: *Morey v. Totten*, 6 Chy. 176.

It is essential to the validity of a deed of gift in favour of a person occupying towards the grantor a relation of trust and confidence (in this case a brother in favour of his brothers) that the

grantee should shew that the grantor had competent and independent advice in the transaction: *Dawson v. Dawson*, 12 Chy. 278.

To sustain a deed of gift to a person standing in a confidential relation to the donor (in this case it was by a father to his son), the donee must establish by clear evidence that the nature and effect of the deed were fully and truly explained to the donor; that he perfectly understood them; that he was made alive, by explanation and advice, to the effect and consequences of executing it, and that the deed was a willing act on his part, and not obtained by the exercise of any of that influence which the confidential relationship of the donee put it in his power to employ; otherwise such deed or gift will be set aside: *Mason v. Seney*, 11 Chy. 447.

The relationship of a medical man to his patient is one of trust and confidence, and any settlement made through him, in consequence of advice given *mala fide*, will be set aside: *Rowe v. Grand Trunk R. W. Co.*, 16 U. C. C. P. 500.

Distinction between undue influence in cases of gifts *inter vivos* and testamentary gifts referred to: *McCaffrey v. McCaffrey*, 18 A. R. 599.

Onus of Proof—Where: *McEwan v. Milne*, 5 O. R. 100. See *Disher v. Clarris*, 25 O. R. 493.

Taking away wife from husband: *Metcalfe v. Roberts*, 23 O. R. 130; see also *McCaffrey v. McCaffrey*, 18 A. R. at p. 610; referring to *Allcard v. Skinner*, 36 Ch. D. 145. A contract for transfer of property with intent by the transferor, and for the purpose that it will be applied by the transferee to the accomplishment of an illegal or immoral purpose, is void, and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not void the contract unless from the particular nature of the property and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended: *Clark v. Hager*, 22 S. C. R. 510. In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to shew that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shewn that they are inconsistent with a contrary hypothesis. Judgment appealed from (3 B. C. Rep. 513) affirmed: *Adams v. McBeath*, 27 S. C. R. 13.

A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence shewed that he understood what he was doing and approved of it afterwards till his death, four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters: Held, that the transaction was a righteous one, and that

the conveyance, being executed voluntarily and deliberately, with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a *sine qua non*, it appearing that the transaction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances: *Empey v. Fick et al.*, 13 O. L. R. 178.

The rule is that to entitle a party to set aside or vary a deed on the ground of misrepresentation by another party to it, the evidence thereof must be the strongest possible; and where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach, and does not choose to do so, he will not on the facts turning out to be different from what they were represented be entitled to any relief: *Coates v. Bacon*, 21 Chy. 21. The mere fact of a person executing a deed while intoxicated will not as a rule suffice to set such deed aside unless undue advantage was taken: *Clarkson v. Kitson*, 4 Chy. 244. Where there is no proof of *mala fides*, or of an unfair exercise of influence, a gift of a trifling sum as compared with the donor's property, does not stand in the same position as a gift of his whole property: *McConnell v. McConnell*, 15 Chy. 20. If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of a father's means, if large, may not be upheld without the evidence required in other cases, of due deliberation, explanation and advice, the gift of more than a trifling proportion may be sustainable without such evidence: *Ib.*

APPENDIX.

I.—ONTARIO EVIDENCE ACT.

II.—LIBEL AND SLANDER ACT.

EVIDENCE ACT.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows.—

Short title. 1. This Act may be cited as "*The Evidence Act*," R. S. O. 1897, c. 73, s. 1.

INTERPRETATION.

2. In this Act,—

Interpre- (a) "Court" shall include a Judge, Arbitrator, Umpire, Com-
tation missioner, Police Magistrate, Justice of the Peace or other officer or
"Court." person having by law or by the consent of parties authority to hear, receive and examine evidence.

"Action." (b) "Action" shall include an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a Statute of Ontario or against a by-law or regulation made under the authority of any such Statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a Court under the law of Ontario. (*New.*)

APPLICATION OF ACT.

Applica- 3. This Act shall extend and apply to the evidence offered or
tion of taken orally or by interrogatories or affidavits or by the production
Act. of documents or things or otherwise by or before a Court in an action. (*New.*)

COMPETENCY OF WITNESSES.

Witnesses 4. No person offered as a witness in an action shall be excluded
not to be by reason of any alleged incapacity from crime or interest from
incapaci- giving evidence. R. S. O. 1897, c. 73, s. 2.

Such per- 5. Every person offered as a witness shall be admitted to give
sons ad- evidence notwithstanding that he has an interest in the matter in

question or in the event of the action, and notwithstanding that he had been previously convicted of a crime or offence. R. S. O. 1897, c. 73, s. 3. Evidence given in

6. The parties to an action, and the persons on whose behalf Evidence the same is brought, instituted, opposed or defended shall, except as of parties. hereinafter otherwise provided, be competent and compellable to give evidence, on behalf of themselves or of any of the parties; and the husbands and wives of such parties and persons shall, except as hereinafter otherwise provided, be competent and compellable to give Evidence evidence on behalf of any of the parties. R. S. O. 1897, c. 73, s. 4. of husband and wife.

7.—(1) A witness shall not be excused from answering any Witness question upon the ground that the answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature of Ontario. excused from answering questions tending to criminate.

(2) If with respect to any question a witness objects to answer upon any of the grounds mentioned in subsection 1, and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature of Ontario. 4 Edw. VII. c. 10, s. 21. Answer not to be used in evidence against him.

8. The parties to an action or proceeding instituted in consequence of adultery, and their husbands and wives shall be competent but not compellable to give evidence, but the husband or wife, if competent only under this Act, shall not be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same action or proceeding in disproof of his or her alleged adultery. R. S. O. 1897, c. 73, s. 7. Evidence in proceedings in consequence of adultery.

9. A husband shall not be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage. R. S. O. 1897, c. 73, s. 8. Communications made during marriage.

EXPERT EVIDENCE.

Limit of number of expert witnesses in action, etc.

10. Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses. 2 Edw. VII. c. 15, s. 1.

CORROBORATIVE EVIDENCE.

Evidence in actions for breach of promise.

11. The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise. R. S. O. 1897, c. 73, s. 6.

In actions by or against representatives of a deceased person, the evidence of the opposite party must be corroborated.

In actions by or against lunatics, etc., evidence of opposite party to be corroborated.

12. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R. S. O. 1897, c. 73, s. 10.

13. In an action by or against a lunatic so found or an inmate of a lunatic asylum, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment, or decision on his own evidence, unless such evidence is corroborated by some other material evidence. R. S. O. 1897, c. 73, s. 11; 63 V. c. 17, s. 13.

OATHS AND AFFIRMATIONS.

Deponent may take oath declared to be binding

14. Where an oath may lawfully be administered to any person as a witness or as a deponent in an action or on appointment to any office or employment or on any occasion whatever, such person shall be bound by the oath administered, if the same shall have been administered in such form and with such ceremonies as such person may declare to be binding. See Imp. Stat., 1 and 2 Vict. c. 105.

Certain persons may make affirmations or declarations instead of oaths.

15.—(1) If a person called as a witness or required or desiring to give evidence or to make an affidavit or deposition in an action or on an occasion whereon or touching a matter respecting which an oath is required or permitted, objects to take an oath or is objected to as incompetent to take an oath and if the presiding Judge or the person qualified to take affidavits or depositions is satisfied that such

person objects to be sworn from conscientious scruples or on the ground of his religious belief or on the ground that the taking of an oath would have no binding effect on his conscience, such person may make an affirmation and declaration in lieu of taking an oath and such affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. R. S. O. 1897, c. 73, ss. 13, 14, *amended*.

(2) Where the evidence is in the form of an affidavit or written deposition the person before whom the same is taken shall certify that the deponent satisfied him that he was a person entitled to affirm. (*New.*)

Certificate that deponent entitled to affirm.

ATTENDANCE OF WITNESSES.

16. A witness served in due time with a subpoena issued out of any court in Ontario, and paid his proper witness fees and conduct money, who shall make default in obeying such subpoena without any lawful and reasonable impediment, shall in addition to any penalty he may incur as for a contempt of court, be liable to an action on the part of the person by whom, or on whose behalf, he shall have been subpoenaed, for any damage which such person may sustain or be put to by reason of such default. 5 Eliz. c. 9, s. 6, R. S. O. 1897, c. 324, s. 13.

Witness disobeying subpoena liable to action.

EXAMINATION OF WITNESSES.

17. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the matter in question, without the writing being shewn to him; but if it is intended to contradict him by the writing, his attention shall, before such contradictory proof is given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the Judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he may think fit. R. S. O. 1897, c. 73, s. 17.

Proof of contradictory written statements.

18. If a witness upon cross-examination as to a former statement made by him relative to the matter in question, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof is given, the circumstances of the supposed statement, sufficient to designate the particular occasion,

Proof of contradictory oral statements.

shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R. S. O. 1897, c. 73, s. 18.

Proof of previous conviction of a witness may be given if he denies it, etc. 19.—(1) A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved; and a certificate containing the substance and effect only (omitting the formal part) of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the officer, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Certificate of conviction.

Fee for. (2) For such certificate a fee of \$1 and no more may be demanded or taken. R. S. O. 1897, c. 73, s. 19.

How far a party may discredit his own witness. 20. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character but he may contradict him by other evidence, or if the witness in the opinion of the Judge or other person presiding proves adverse such party may by leave of the Judge or other person presiding prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

STATUTES AND PUBLIC DOCUMENTS.

Statutes, Proclamations, Orders in Council, Letters Patent, etc.

Evidence of Letters Patent. 21. Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's Dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which the same may have issued, and such exemplification shall have the like force and effect for all purposes as the letters patent thereby exemplified, as well against His Majesty as against all other persons whomsoever. 3 & 4 Edw. 6, c. 4, and 13 Eliz. c. 6; R. S. O. 1897, c. 324, s. 12.

Copies of Canadian 22. Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof

and other public documents purporting to be printed by or under the authority of the Parliament of Great Britain and Ireland or of the Imperial Government or by or under the authority of the Government or of any legislative body of any Dominion, Commonwealth, State, Province, Colony, Territory, or Possession within the King's dominions, shall be admitted in evidence to prove the contents thereof. R. S. O. 1897, c. 73, s. 21, *amended*.

23. *Prima facie* evidence of a proclamation, order, regulation or appointment to office made or issued.

- (a) By the Governor-General or the Governor-General in Council, or other Chief Executive Officer or Administrator of the Government of Canada, or
- (b) By or under the authority of any Minister or Head of any Department of the Government of Canada or of a Provincial or Territorial Government in Canada, or
- (c) By a Lieutenant-Governor or Lieutenant-Governor in Council or other Chief Executive Officer or Administrator of Ontario or of any other Province or Territory in Canada.

may be given by the production of

- (a) A copy of the *Canada Gazette* or of the official Gazette for any Province or Territory purporting to contain a notice of such proclamation, order, regulation or appointment, or
- (b) A copy of such proclamation, order, regulation or appointment purporting to be printed by the King's Printer or by the Government Printer for the Province or Territory, or
- (c) A copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such Minister or Head of a Department or by the Clerk or assistant or acting Clerk of the Executive Council or by the Head of any Department of the Government of Canada or of a Provincial or Territorial Government or by His Deputy or acting Deputy. R. S. O. 1897, c. 73, ss. 22, 23.

24. An order in writing purporting to be signed by the Secretary of State of Canada, and to be written by command of the Governor-General, shall be received in evidence as the order of the Governor-General.

Proclamations, Orders in Council, etc., of Government of Canada and of Provincial Governments, how proved.

Orders signed by Secretary of State or

Provincial General; and an order in writing purporting to be signed by the Provincial Secretary. Provincial Secretary and to be written by command of the Lieutenant-Governor, shall be received in evidence as the order of the Lieutenant-Governor. R. S. O. 1897, c. 73, s. 24.

Official Documents.

Notices in Gazette. 25. Copies of proclamations and of official and other documents, notices and advertisements printed in the *Canada Gazette* or in the *Ontario Gazette*, or in the official Gazette of any Province or Territory in Canada shall be *prima facie* evidence of the originals, and of the contents thereof. R. S. O. 1897, c. 73, s. 25. See R. S. C. 1906, c. 145, s. 21.

How public or official documents proved. 26. Where the original record could be received in evidence, a copy of any official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of any entry in any register or other book of any corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation, and the hand of the presiding officer or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R. S. O. 1897, c. 73, s. 26.

By-laws, etc., of corporations.

Privilege in case of official documents. 27. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a Department of the Public Service of Ontario, if the Deputy head or other officer of the Department has the document in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the Department, to object to produce the document on the ground that it is privileged; and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the Executive Council or head of the Department were personally present and made the objection. R. S. O. 1897, c. 73, s. 27.

Entries in departmental books to be *prima facie* evidence. 28. A copy of an entry in any book of account kept in any department of the Government of Canada or of Ontario, shall be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was,

at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof. R. S. O. 1897, c. 73, s. 28. See R. S. C. 1906, c. 145, s. 26.

29.—(1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom shall be admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted. Copies of public books or documents admissible in evidence.

(2) Such officer shall furnish the certified copy or extract to any person applying for the same at a reasonable time, upon his paying therefor a sum not exceeding ten cents for every folio of one hundred words. R. S. O. 1897, c. 73, s. 29. Copies to be delivered if required.

[As to documents in Crown Lands Department see R. S. O. Chap. 28, s. 47.]

Signatures of Judges, etc.

30.—(1) All Courts, Judges, Justices, Masters, Clerks of Courts, Commissioners and other officers acting judicially, shall take judicial notice of the signature of any of the Judges of any Court in Canada, in Ontario and in every other Province and Territory in Canada, where such signature is appended or attached to any decree, order, etc., certificate, affidavit, or judicial or official document. R. S. O. 1897, c. 73, s. 30, *part*. Judicial notice to be taken of signatures of Judges.

(2) The Members of the Board of Railway Commissioners of Canada and of the Ontario Railway and Municipal Board, the Mining Commissioner and the Referees appointed under *The Municipal Drainage Act* shall be deemed Judges for the purposes of this section. *New.*

31. No proof shall be required of the handwriting or official position of any person certifying to the truth of any copy of or extract from any proclamation, order, regulation or appointment. Proof of handwriting, when not required.

Section 31 is amended by section 29 of chapter 17 of Ontario Statutes, 1911, by striking out all the words after the words "appointment" in the 4th line and substituting "or to any matter or thing as to which he is by law authorized or required to certify."

and any such copy or extract may be in print or in writing, or partly in print and partly in writing. R. S. O. 1897, c. 73, s. 30, *part*.

Foreign Judgments.

Foreign judgments, etc., how proved.

32. A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any Court of Record in England or Ireland or in any of the Superior Courts of Law, Equity or Bankruptcy in Scotland, or in any Court of Record in Canada or in any of the Provinces or Territories in Canada, or in any British Colony or Possession, or in any Court of Record of the United States, or of any State of the United States of America, may be proved by an exemplification of the same under the seal of the Court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree, or other judicial proceeding of the High Court in Ontario may be proved by an exemplification thereof. R. S. O. 1897, c. 73, s. 31.

Notarial Documents.

Copies of notarial acts in Quebec admissible.

33. A copy of a notarial act or instrument in writing made in Quebec, before a Notary and filed, enrolled or enregistered by such notary, certified by a Notary or Prothonotary to be a true copy of the original thereby certified to be in his possession as such Notary or Prothonotary, shall be receivable in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved. R. S. O. 1897, c. 73, s. 32.

How impeached.

34. The proof by such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may by the law of Quebec, be taken before a Notary, or be filed, enrolled or enregistered by a Notary. R. S. Q. 1897, c. 73, s. 33.

Protests of Bills and Notes.

Production of protest to be *prima facie* evidence that protest was made.

35. A protest of a bill of exchange or promissory note purporting to be under the hand of a Notary Public wherever made, shall be received as *prima facie* evidence of the allegations and facts therein stated. R. S. O. 1897, c. 73, s. 34.

Certain certificates of notaries to be *prima facie* evidence.

36. Any note, memorandum or certificate purporting to be made by a Notary Public in Canada, in his own handwriting or to be signed by him at the foot of or embodied in any protest, or in a regular register of official acts purporting to be kept by him, shall be *prima facie* evidence of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or deliv-

ered, at the time and in the manner stated in such note, certificate or memorandum. R. S. O. 1897, c. 73, s. 35.

Sheriff's Conveyance on Division Court Judgment.

37. In proving a title under a Sheriff's conveyance based upon an execution issued from a Division Court it shall be sufficient to prove the judgment recovered in the Division Court without proof of any prior proceedings. R. S. O. 1897, c. 73, s. 36.

Proving
titles under
Division Court
executions

Affidavits, etc., made out of Ontario.

38. Oaths, affidavits, affirmations, or declarations administered, sworn, affirmed or made out of Ontario:

- (a) In England or Ireland before a Commissioner authorized to administer oaths in the Supreme Court of Judicature of England or Ireland;
- (b) In England or Ireland before a Judge of the Supreme Court of Judicature of England or Ireland;
- (c) In Scotland before a Judge of the Court of Session or the Justiciary Court of Scotland;
- (d) Before a Judge of any of the County Courts of Great Britain or Ireland, within his County;
- (e) In Great Britain or Ireland, or in any Colony of His Majesty, or in any foreign country, before the Mayor or Chief Magistrate of any City, Borough or Town corporate, certified under the common seal of such City, Borough, or Town corporate;
- (f) In any Colony belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country before a Judge of any Court of Record or of supreme jurisdiction;
- (g) In the British Possessions in India, before any Magistrate or Collector certified to have been such under the hand of the Governor of such Possession;
- (h) In Quebec, before a Judge or Prothonotary of the Superior Court or Clerk of the Circuit Court.
- (i) In any foreign place, before any Consul, Vice-Consul, or Consular Agent of His Majesty exercising his functions;
- (j) Before a Notary Public and certified under his hand and official seal;
- (k) Or before a Commissioner authorized by the laws of Ontario to take such affidavits;

shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in Ontario

before a Commissioner for taking affidavits therein, or other competent authority of the like nature. R. S. O. 1897 c. 73, s. 37.

Seal and
signature
need not
be proved.

39. Any document purporting to have affixed, impressed or subscribed thereon or thereto the signature of such Judge or Commissioner, or the signature and official seal of such Notary Public, or Prothonotary, or the seal of the Corporation and the signature of such Mayor or Chief Magistrate or Governor as aforesaid, of the seal and signature of such Consul, Vice-Consul or Consular agent in testimony of such oath, affidavit, affirmation, or declaration having been administered, sworn, affirmed or made by or before him, or for any other purpose authorized by this Act, shall be admitted in evidence without proof of such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature the same purport to be, or of the official character of such person. R. S. O. 1897, c. 73, s. 38.

Formal Defects in Affidavits.

Informal
headings,
etc., not to
invalidate.

40. No informality in the heading, or other formal requisites to any affidavit, declaration or affirmation, made or taken before a Commissioner or other person authorized to take affidavits under *The Commissioners for taking Affidavits Act*, or under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered thinks proper to receive it. R. S. O. 1897, c. 73, s. 39.

9 Edw.
VII., c. 44

Depositions.

Copies of
deposi-
tions certi-
fied by
person
taking the
same ad-
missible in
evidence.

41. Where an examination or deposition of a party or witness has been taken before a Judge or other officer or person appointed to take the same, copies of the examination or deposition certified under the hand of the Judge, officer or other person taking the same, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R. S. O. 1897, c. 73, s. 40.

In actions
concerning
real estate,
probate,
etc., to be
*prima
facie* evi-
dence of
will, etc.,
after cer-
tain no-
tice, unless
its validity
is put in
issue.

Proof of Wills.

42. In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will or letters of administration with the will annexed containing such devise or disposition or a copy thereof under the seal of the Surrogate Court granting the same, or under the seal of the High Court, where the probate or letters of administration were granted by the former Court of Probate for Upper Canada, shall be *prima facie* evidence of the will, and of its validity and contents. R. S. O. 1897, c. 73, s. 41. *Amended.*

43. Where a person dies in any of His Majesty's possessions out of Ontario having made a will sufficient to pass real estate in Ontario, purporting to devise, charge or affect real estate in Ontario, the party desiring to establish any such disposition, after giving one month's notice to the opposite party to the proceeding of his intention so to do, may produce and file the probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the Court which granted the same with a certificate of the Judge, Registrar, or Clerk of such Court that the original will is filed and remains in the Court and purports to have been executed before two witnesses, and such probate or letters of administration or certified copy with such certificate shall, unless the Court otherwise orders, be *prima facie* evidence of the will and of its validity and contents. R. S. O. 1897, c. 73, s. 43, *Amended*.

Proof in the case of will of real estate filed in courts in other British possessions.

44. The production of the certificate, in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the Judge, Registrar or Clerk, without proof of his appointment, authority or signature. R. S. O. 1897, c. 73, s. 44.

Certificate to be *prima facie* evidence.

Copies of Registered Instruments.

45. The word "instrument" in the next succeeding two sections shall have the meaning assigned to that word in section 2 of *The Registry Act*. R. S. O. 1897, c. 73, s. 45.

Meaning of "instrument." Rev. Stat., c. 136.

46. A copy of an instrument or memorial certified under the hand and seal of the office of the Registrar, Master of Titles, or Local Master of Titles, in whose office the same is deposited, filed, kept or registered to be a true copy shall be *prima facie* evidence of the original, except in the cases provided for in section 47. R. S. O. 1897, c. 73, s. 46.

Registered instrument *prima facie* evidence.

[As to effect of production of an original duplicate the registration of which is certified, see R. S. O., Chap. 136, sec. 63.]

47. Where it would be necessary to produce and prove an instrument or memorial which has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove the same may give notice to the opposite party ten days at least before the trial, or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the Registrar,

Certified copies of registered instruments may be used instead of originals after notice.

Exception Master of Titles, or Local Master of Titles, under his hand and seal of office, and in every such case the copy so certified shall be sufficient evidence of the instrument or memorial and of its validity and contents, unless the party receiving the notice within four days after such receipt, gives notice that he disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any or either of the parties as may be demed just. R. S. O. 1897, c. 73, s. 47.

Copies of original documents to be filed in lieu of originals. 48.—(1) Where a public officer produces upon a subpœna an original document, it shall not be deposited in Court, unless otherwise ordered, but if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as may be deemed necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original; and the officer shall be entitled to receive in addition to his ordinary fees, the fees for any certified copy, to be paid to him before it is delivered or filed. R. S. O. 1897, c. 73, s. 48.

Original to be retained upon order of Judge. (2) Where an order is made that the original be retained, the order shall be delivered to the public officer, and the exhibit shall be retained in Court and filed. R. S. O. 1897, c. 73, s. 49.

Copies of other written Instruments.

Copies of certain documents may be admitted as evidence on certain conditions 49.—(1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other written instrument used in business or other transactions, may give notice to the opposite party ten days at least before the trial or other proceeding in which the proof is intended to be adduced that he intends to give in evidence as proof of the contents, a writing purporting to be a copy of the document and in the notice shall name some convenient time and place for the inspection thereof.

Inspection (2) Such copy may then be inspected by the opposite party; and shall without further proof be sufficient evidence of the contents of the original document, and be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original; and the costs attending any production or proof of the original document shall be in the discretion of the Court. R. S. O. 1897, c. 73, s. 51.

Costs

MISCELLANEOUS PROVISIONS.

50.—(1) Where it is made to appear to the High Court or a Judge thereof, or to a Judge of a County or District Court, that any Court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, the obtaining of the testimony in or in relation to any action, suit or proceeding pending in or before such foreign Court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the Court or Judge so applied to, such Court or Judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process; and may by the same or by a subsequent order, command the attendance of any person named therein for the purpose of being examined, or the production of any writing or other document or thing mentioned in the order; and may give all such directions as to the time and place of the examination, and all other matters connected therewith, as may seem proper; and the order may be enforced, and any disobedience thereto punished, in like manner as in case of an order made by the same Court or Judge in an action pending in such Court or before such Judge.

Witnesses may be ordered to be examined in relation to any matter pending before a foreign tribunal.

(2) A person whose attendance is so ordered shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the High Court.

Payment of expenses of witness.

(3) A person examined under such commission, order or other process, shall have the like right to object to answer questions tending to criminate himself, and to refuse to answer any questions which, in an action pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer; and no person shall be compelled to produce at the examination, any writing, document or thing which he would not be compellable to produce at the trial of such an action.

Right of refusal to answer questions and to produce documents

(4) Where the commission, order or other process or the instruments of the Court accompanying the same direct that the person to be examined shall be sworn or shall affirm the person so appointed shall have authority to administer the oath to him or take his affirmation. R. S. O. 1897, c. 73, s. 52.

Administration of oath.

51. It shall not be necessary to prove by the attesting witness, an instrument to the validity of which attestation is not requisite. R. S. O. 1897, c. 73, s. 54.

Attesting witness need not be called where none is required by law.

Comparison of disputed writing with genuine. 52. Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by a witness; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court or jury, as evidence of the genuineness or otherwise of the writing in dispute. R. S. O. 1897, c. 73, s. 55.

When instruments offered in evidence may be impounded. 53. Where a document is received in evidence the Court admitting the same may direct that it be impounded and kept in such custody for such period and subject to such conditions as may seem proper or until the further order of the Court or of the High Court or a Judge thereof or of a County or District Court (as the case may be).

Evidence dispensed with under Rev. Stat., c. 134. 54. It shall not be necessary in an action to produce any evidence which by section 2 of *The Vendors and Purchasers Act* is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of the action. R. S. O. 1897, c. 134, s. 3.

Repeal. 55. Chapter 73 of the Revised Statutes of Ontario, 1897 (except section 53) and all amendments to the said Act are repealed.

LIBEL AND SLANDER ACT.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title. 1. This Act may be cited as "*The Libel and Slander Act.*"

Interpretation. 2. In this Act "newspaper" shall mean a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two of such papers, parts or numbers, and shall include a paper printed in order to be made public weekly or oftener, or at intervals not exceeding thirty-one days, and containing only, or principally, advertisements. R. S. O. 1897, c. 68, s. 1; 6 Edw. VII. c. 22, s. 1.

LIBEL AND SLANDER.

Averments in actions for libel or slander. 3. In an action for libel or slander, the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying the defamatory sense without any prefatory averment to shew how the words or matter were used in that sense, and the aver-

ment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the statement of claim shall be sufficient. R. S. O. 1897, c. 68, s. 3.

4. In an action for libel or slander where the defendant has pleaded a denial of the alleged libel or slander only, or has suffered judgment by default, or judgment has been given against him on motion for judgment on the pleadings, he may give in evidence, in mitigation of damages, that he made or offered a written or printed apology to the plaintiff for such libel or slander before the commencement of the action; or, if the action was commenced before there was an opportunity of making or offering such apology, that he did so as soon afterwards as he had an opportunity. R. S. O. 1897, c. 68, s. 4.

Defendant may prove in mitigation that he offered a written or printed apology.

LIBEL.

5. On the trial of an action for libel the jury may give a general verdict upon the matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; but the Court shall, according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases; and the jury may on such issue find a special verdict, if they think fit so to do, and the proceedings after verdict, whether general or special, shall be the same as in other cases. R. S. O. 1897, c. 68, s. 2.

Jury not to be directed to return a verdict of guilty on the mere proof of the publication and of the sense ascribed.

6.—(1) The Court or a Judge upon an application by two or more defendants, in any two or more actions for the same or substantially the same libel or for a libel or libels contained in articles the same or substantially the same published in different newspapers, brought by one and the same person, may make an order for the consolidation of such actions so that they shall be tried together; and after such order has been made, and before the trial of such actions, the defendants in any new actions instituted in respect to any such libel or libels shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated.

Consolidation of different actions for same libel.

(2) In a consolidated action under this section the jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury find a verdict against the defendant or defendants in

How damages assessed and costs apportioned in such cases.

more than one of the actions so consolidated they shall apportion the amount of the damages between and against such last mentioned defendants; and the Judge at the trial, in the event of the plaintiff being awarded the cost of the action, shall thereupon make such order as he shall deem just for the apportionment of the costs between and against such defendants. R. S. O. 1897, c. 68, s. 14.

(3) For the purposes of this section "article" shall include anything appearing in a newspaper as an editorial or as correspondence or otherwise than as an advertisement.

NEWSPAPER LIBEL.

Defendant may plead that the libel was inserted without malice or gross negligence, and that he published or offered to publish an apology.

Action not to lie till notice given.

7. In an action for libel contained in a newspaper, the defendant may plead in mitigation of damages that the libel was inserted therein without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper a full apology for the libel; or if the newspaper in which the libel appeared is one ordinarily published at intervals exceeding one week, that he offered to publish the apology in any newspaper to be selected by the plaintiff. R. S. O. 1897, c. 68, s. 6 (1).

8.—(1) No action for libel contained in a newspaper shall lie unless the plaintiff has within six weeks after the publication thereof has come to his notice or knowledge, given to the defendant notice in writing, specifying the statement complained of, which shall be served in the same manner as a statement of claim or by delivering the notice to a grown up person at the place of business of the defendant.

(2) The plaintiff shall recover only actual damages if it appears on the trial

- (a) That the alleged libel was published in good faith,
- (b) That there was reasonable ground to believe that the publication thereof was for the public benefit,
- (c) That it did not involve a criminal charge,
- (d) That the publication took place in mistake or misapprehension of the facts, and,
- (e) That a full and fair retraction of any statement therein alleged to be erroneous was published either in the next regular issue of the newspaper, or in any regular issue thereof published within three days after the receipt of such notice, and was so published in as conspicuous a place and type as was the alleged libel. R. S. O. 1897, c. 68, s. 6 (2).

(3) The provisions of this section shall not apply to the case of a libel against any candidate for public office in Ontario, unless the retraction of the charge is made editorially in a conspicuous manner, at least five days before the election. R. S. O. 1897, c. 68, s. 6 (3). Section not to apply to certain cases.

9. A defendant may pay into Court with his defence, a sum of money by way of amends for the injury sustained by the publication of any libel to which the two next preceding sections apply, and, except so far as regards the additional facts hereinbefore required to be pleaded by a defendant, such payment shall have the same effect as payment into Court in other cases. R. S. O. 1897, c. 68, s. 7. And may pay money into Court as amends

10.—(1) A fair and accurate report published in a newspaper of any proceedings in the Senate or House of Commons of Canada, in any Legislative Assembly of any of the Provinces of Canada, or in any Committee of any of such bodies or of a Public Meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a Municipal Council, School Board, Board of Education, Provincial Board of Health, Medical Health Board, or of any other board or local authority formed or constituted under any of the provisions of any Public Act of any Legislative Assembly of any of the Provinces of Canada or of the Parliament of Canada, or of any Committee appointed by any of the above-mentioned bodies, and the publication of the whole, or a portion or a fair synopsis, of any report, bulletin, notice or other document, issued for the information of the public from any Government Office or Department, or by any Provincial Board of Health, Medical Health Board, or Medical Health Officer, or the publication, at the request of any Government or Municipal Official, Commissioner of Police, or Chief Constable, of any notice or report issued by him for the information of the public, shall be privileged, unless it shall be proved that such publication was made maliciously. Reports of proceedings, public meetings, etc.

(2) Nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter. Blasphemous or indecent matter.

(3) The protection intended to be afforded by this section shall not be available as a defence in any proceeding if the plaintiff shows that the defendant has refused to insert in the newspaper making such publication a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff. When defendant refuses to publish explanation.

(4) Nothing in this section shall limit or abridge any privilege now by law existing, or protect the publication of any matter not of public concern or the publication of which is not for the public benefit. 6 Edw. VII. c. 22, s. 2. Provide saving matters of public concern.

Meaning of "public meeting." (5) For the purpose of this section "public meeting" shall mean a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance of discussion of any matter or public concern whether the admission thereto be general or restricted. (*See* 51-52 Vict. c. 64, s. 4, Imp., *part.*)

Report of proceedings in Court privileged. 11.—(1) A fair and accurate report without comment in a newspaper or proceedings publicly heard before a Court of Justice if published contemporaneously with such proceedings shall be absolutely privileged, unless the defendant has refused or neglected to insert in the newspaper in which the report complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff. R. S. O. 1897, c. 68, s. 9.

Publication of improper matter not authorized. (2) Nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter. (*See* 51-52 Vict. c. 64, s. 4, Imp., *part.*)

Security for costs. 12.—(1) In an action for libel contained in a newspaper, the defendant may, at any time after the delivery of the statement of claim, or the expiry of the time within which it should have been delivered, apply to the Court or Judge for security for costs, upon notice and an affidavit by the defendant or his agent, shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order shall be a stay of proceedings until the security is given.

Where libel involves a criminal charge. (2) Where the alleged libel involves a criminal charge the defendant shall not be entitled to security for costs under this Act, unless he satisfies the Court or Judge that the action is trivial or frivolous, or that the circumstances which under section 8 entitle the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstance that the article complained of involves a criminal charge.

Examination of plaintiff. (3) For the purposes of this section the plaintiff or the defendant or their agents may be examined upon oath at any time after the delivery of the statement of claim. R. S. O. 1897, c. 68, s. 10.

(4) An order made under this section by a Judge of the High Court shall be final and shall not be subject to appeal, but where the order is made by a Local Judge an appeal therefrom shall lie to a Judge of the High Court sitting in Chambers, whose order shall be final and shall not be subject to appeal. R. S. O. 1897, c. 68, s. 15.

13. An action for libel contained in a newspaper shall be tried in the county where the chief office of such newspaper is, or in the county wherein the plaintiff resides at the time the action is brought; but upon the application of either party the Court or a Judge may direct the action to be tried or the damages to be assessed in any other county if it appears to be in the interests of justice, or that it will promote a fair trial, and may impose such terms as to the payment of witness fees and otherwise as may seem proper. R. S. O. 1897, c. 68, s. 11.

14. An action for libel contained in a newspaper shall be commenced within three months after the publication thereof has come to the notice or knowledge of the person defamed; but where an action is brought and is maintainable for a libel published within that period, the same may include a claim for any other libel published against the plaintiff by the defendant in the same newspaper within a period of one year before the commencement of the action. R. S. O. 1897, c. 68, s. 13.

15.—(1) No defendant shall be entitled to the benefit of sections 8 and 14 of this Act unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the front page of the newspaper.

(2) The production of a printed copy of a newspaper shall be *prima facie* evidence of the publication of the said printed copy, and of the truth of the statements mentioned in subsection 1.

16. Service of any notice under this Act and of the writ of summons may be made upon the proprietor or publisher of the newspaper by serving the same upon any grown up person at such address.

17. In an action for libel contained in a newspaper, the defendant may prove in mitigation of damages that the plaintiff has already brought actions for, or has recovered damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as that for which such action is brought. R. S. O. 1897, c. 68, s. 16.

Sec. 8, subs. 1 and s. 14 only applicable to newspapers published in Ontario.

18. Subsection 1 of section 8 and section 14 shall only apply to newspapers printed and published in Ontario.

SLANDER OF WOMEN.

Proof of special damage not required in certain cases.

19.—(1) In an action for slander for defamatory words spoken of a woman imputing unchastity or adultery, it shall not be necessary to allege in the plaintiff's statement of claim or to prove that special damage resulted to the plaintiff from the utterance of such words, and the plaintiff may recover nominal damages without averment or proof of special damage, but shall not be entitled to recover more than nominal damages unless special damage is proved.

Security for costs.

(2) The defendant may, at any time after the delivery of the statement of claim, apply to the Court or a Judge for security for costs, upon notice and an affidavit shewing the nature of the action and that the plaintiff is not possessed of property sufficient to answer the costs of the action if a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence on the merits, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for the costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order shall be a stay of proceedings until the security is given.

Examination of parties.

(3) For the purposes of subsection 2 the plaintiff or the defendant may be examined upon oath at any time after the delivery of the statement of claim. R. S. O. 1897. c. 68, s. 5.

GENERAL.

Commencement of Act.

20. This Act shall come into force on the 1st day of September, 1909.

Repeal.

21. Chapter 68 of the Revised Statutes of Ontario, 1897, and all amendments thereto are repealed.

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